81-2252

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HONDA MOTOR COMPANY, LTD. and
AMERICAN HONDA MOTOR CO., INC.,

Petitioners,

v.

GLEN K. DORSEY, BARBARA DORSEY,
CONTINENTAL CASUALTY CO., and
MISSION INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 7, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Where, while the appeal was pending, the Supreme Court of Florida issued an opinion requiring proof of some fault on the part of a principal for vicarious liability for punitive damages, and the opinion of the Court of Appeals said there was no evidence of fault on the part of the principal in this case, did the decision of the Court of Appeals reinstating the judgment for punitive damages violate 28 U.S.C. § 1652, the Rules of Decision statute?

2. Where state law requires proof by a plaintiff of some fault on the part of a principal before the principal may be vicariously liable for punitive damages, does imposition of punitive damages when the evidence does not distinguish between the acts of principal and agent violate due process requirements by shifting the burden of proof to the defendant?

3. May punitive damages be awarded against an automobile manufacturer which has complied with all applicable federal regulations, when those regulations preempt state law and where state law requires proof of wanton disregard of the rights of others for imposition of punitive damages?

Petitioners also desire to reserve the right to argue the question of the sufficiency of the evidence to support the award of compensatory damages should this Court accept jurisdiction, but recognize that question is not appropriate as a basis for certiorari.

LIST OF SUBSIDIARY AND AFFILIATED COMPANIES

American Honda Motor Company, Inc., is a wholly owned subsidiary of Honda Motor Company, Ltd., which is the parent corporation. The following is a list of subsidiary and affiliate corporations of Honda Motor Co., Ltd., which are not wholly owned:

JAPANESE COMPANIES

Honda S.R. Corporation
Honda Carburetor Research and Development Co., Ltd.
Honda Land Co., Ltd.
Kaihatsu Sogyo K.K.
ACT Maritime Co., Ltd.
Press Engineering Co., Ltd.
Asama Giken Co., Ltd.
KGD Co., Ltd.
Showa Manufacturing Co., Ltd.
K. K. Honda Express
Keihin Seiki Mfg. Co., Ltd.
Honda Kinzoku Gijutsu K.K.
Tokyo Seat K.K.
Goshi Giken Kogyo K.K.
Yachiyou Kogyo K.K.
K.K. Steel Center
Hirata Press Kogyo K.K.
Takao Kinzoku Kogyo K.K.
Kyushu Uanagawa Seiki Co., Ltd.
Kyushu Musashi Seimitsu K.K.
K.K. Atsumi Seisakusho
K.K. Tanaka Machine Kogyo
K.K. Torii Togo Kojo
Nissin Kogyo K.K.
Fuji Chemical Co., Ltd.
Kokusan Kogyo K.K.
Daishin Sangyo K.K.

Keihin Carburetor Co., Ltd.
Towa Kogyo K.K.
Fukuda Press Kogyo K.K.
K.K. Matsuyama Seisakusho
Mitswa Kokan K.K.
Moriskawa Sangyou K.K.
Yanagwa Seiki K.K.
K.K. Riken

FOREIGN COMPANIES

Thai Honda Mfg. Co., Ltd.
Honda Europe N.V.
Honda Motor Gmb H
United Car Transport Co.
Honda (Suisse) S.A.
Honda Automobile (Suissee) S.A.
Armstrong Cycle Parts BND. BHD.
Mariwasa Honda Inc.
P.T. Imora Honda Inc.
Honda Del Peru S.A.
Tizro Mfg. Co.
Honda Manufacturing (Nigeria) Ltd.
Honda Espana S.A.
Armstrong Auto Parts SDN. BHD.
Asian Auto Parts Co., Ltd.

UNITED STATES COMPANIES

Belmer Co.
Honda of America Mfg. Inc.

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IN THE

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OCTOBER TERM, 1981

No.

HONDA MOTOR COMPANY, LTD. and
AMERICAN HONDA MOTOR CO., INC.,

Petitioners,

v.

GLEN K. DORSEY, BARBARA DORSEY,
CONTINENTAL CASUALTY CO., and
MISSION INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, HONDA MOTOR COMPANY, LTD. and AMERICAN HONDA MOTOR CO., INC., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 11, 1981, rehearing denied and opinion modified, March 8, 1982, and rehearing en banc denied, April 30, 1982.

OPINION BELOW

The opinion of the Court of Appeals, reported at 655 F.2d 650; the order modifying the opinion and denying rehearing, reported at 670 F.2d 21, and the order denying rehearing en banc, reported at 673 F.2d 911, appear in the Appendix. The Memorandum of Decision of the District Court of the Middle

District of Florida, Orlando Division, setting aside the jury verdict for punitive damages also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 11, 1981. A timely petition for rehearing was denied March 8, 1982. A petition for rehearing en banc was subsequently filed and Respondents Dorseys moved to strike the petition as untimely. The motion to strike was denied and rehearing en banc was denied on April 30, 1982. This petition for certiorari was filed within 90 days of March 8, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional and statutory provisions involved in this petition are set out in full in the Appendix. Their citations follow:

U.S. Const., amend. V
15 U.S.C. § 1381
15 U.S.C. § 1391(1)
15 U.S.C. § 1391(2)
15 U.S.C. § 1392(d)
15 U.S.C. § 1392(f)
15 U.S.C. § 1397(c)
28 U.S.C. § 1652

STATEMENT OF THE CASE

This is a diversity case involving the crashworthiness of the Honda AN 600. The district court had jurisdiction pursuant to 28 U.S.C. § 1332, because the Dorseys are citizens of Florida and each of the defendants is a citizen of a state other than Florida, or a citizen of a foreign state and the amount in controversy exceeded $10,000. Mission Insurance Company and Continental Casualty Co., the insurers of Honda Motor

Co., Ltd. (Honda), were defendants in the trial court and are named as respondents here because they may continue to have an interest in the outcome, but did not wish to join as petitioners.

Mr. Dorsey received serious head injuries, though wearing his seat belt, when his Honda AN 600 weighing 1,300 pounds was involved in a collision in Florida with a full sized Ford weighing 3,600 pounds. The Ford was attempting a left hand turn, and the impact was at a 45° angle. The Dorseys sued Honda, the manufacturer, and American Honda, the distributor, alleging a design defect, and seeking recovery on negligence, warranty, and strict liability theories. The AN 600 was designed and tested by Honda Research and Development (Honda R & D), a wholly owned corporate subsidiary of Honda, but not a party to the lawsuit.

Florida law was controlling, and on November 28, 1978, all parties entered into a pretrial stipulation. Among other things that stipulation included the following stipulation on the vicarious liability of Honda:

> VII. Principles Of Law On Which There Is Agreement: 1. Honda Motor Company, Ltd., As The Manufacturer Is Liable For Any Negligence Of [sic - "or"] Breach Of Warranty With Respect To Any Component Part Which Is Defectively Designed And Manufactured Even Though Such Part May Have Been Obtained From A Third-Party Supplier.

Four months later, March 28, 1979, the Dorsey's made their first claim for punitive damages in the Amendment to Third Amended Complaint.

The case was tried to a jury which returned a special verdict finding Honda and American Honda liable on all theories and awarding compensatory damages of $825,000. The jury also awarded punitive damages of $5,000,000 against Honda alone.

Under one view of the evidence, head-on barrier tests on prototypes conducted by Honda R & D resulted in head injuries to the test dummy. The evidence was uncontradicted, however, that production models of the AN 600 complied with all applicable federal standards, including steering wheel displacement, strength of the seat assembly, and strength, elasticity, and anchorage of the seat belts.

On hearing post-trial motions, the district court allowed the compensatory damages to stand, but struck the punitive damage award as contrary to the law of Florida. The district court ruled that because it was basically the diminutive size of the Honda and the difference in size between the two cars which made the Honda unsafe, and because the Dorseys' vehicle was manufactured in accordance with all applicable federal standards, the evidence precluded a finding of such an entire want of care necessary for an award of punitive damages under Florida law.

On appeal, a panel of the Fifth Circuit (which contained no Florida judges), upheld the compensatory damages, but reversed the trial court's decision on punitive damages, reinstating the $5,000,000. The Court of Appeals said that the seat assembly and seat belt elasticity (both covered by and complying with federal standards) were causal factors of injury unrelated to the car's size. 655 F.2d at 655. The Court of Appeals also found that there was no evidence of recklessness or even knowledge of a defect on the part of Honda, stating:

> Neither Continental nor the district court points us to substantial evidence that any responsible person of Honda was reckless or even that any such person had knowledge of the results of the tests conducted by Honda R & D or of the recommendations of Honda R & D employees that design of the AN 600 be changed. The liability of Honda is, therefore, not based upon its own acts but upon those of

> Honda R & D and its employees, for which Honda in the pretrial order accepted responsibility. 655 F.2d at 660.

This language clearly states the vicarious basis of the liability of Honda for punitive damages. Honda would have been vicariously liable for punitive damages based solely on the conduct of its employees or agents until the decision in *Mercury Motors Express, Inc.* v. *Smith*, 393 So.2d 545 (Fla. 1981).

In *Mercury Motors*, the Supreme Court of Florida reversed one decision and overruled others which had held that the principal could be vicariously liable for punitive damages, just as for compensatory damages, even if he were without fault. The Florida court replaced this rule with the requirement that a plaintiff allege and prove some fault on the part of the principal which foreseeably contributed to the plaintiff's injury before a principal may be held vicariously liable for punitive damages.

The decision in *Mercury Motors*, issued a few days before oral argument in this case, was brought to the attention of the Court of Appeals before its opinion was issued. It was also the basis for a petition for rehearing. The Fifth Circuit denied rehearing, but issued an opinion in which it noted the decision in *Mercury Motors*, and reiterated that there was no clear evidence of what Honda, as opposed to Honda R & D had done. The court's response, however, was to modify its opinion by deleting its comments that there was no evidence of fault on the part of Honda, independent of Honda R & D.

Thereupon, Honda sought rehearing en banc based upon *Mercury Motors* and the requirement that federal courts of appeals follow controlling state law. That rehearing was denied, and this petition follows.

REASONS FOR GRANTING THE WRIT

1. The Decision Conflicts With The Decisions Of This Court As To The Duty Of Federal Appellate Courts To Apply Controlling State Law.

In *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327 (1941) and *Huddleston* v. *Dwyer*, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944), this Court held that the Rules of Decision statute, 28 U.S.C. § 1652, requires that federal appellate courts apply controlling state law as it exists at the time of appeal, even when the law has changed subsequent to the judgment in the district court. In *Vandenbark*, the Court stated that the rule to be followed was that stated in *United States* v. *Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1802):

> "But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *Vandenbark*, 311 U.S. at 541.

The Court of Appeals neither obeyed nor denied the obligation of *Mercury Motors Express, Inc.* v. *Smith*, 393 So.2d 545 (Fla. 1981), that there must be evidence of some fault on the part of the principal before the principal may be vicariously liable for punitive damages. Rather, it simply deleted from its opinion the comments that there was no evidence of fault on the part of Honda.

In its opinion denying rehearing, the Court of Appeals ruled that, the case having been tried under the pretrial order (which simply stated the law of Florida as it existed), it was "too late" for Honda to rely on *Mercury Motors*. 670 F.2d at 22. But that ruling is directly contrary to the holdings in *Vandenbark* and *Huddleston* which ruled that the litigants in cases controlled by state law may raise a change in state law at any time as long as the case is *sub judice*. The opinion of the Fifth Circuit announces a rule in direct conflict with the one long established

by this Court that it is the duty of a federal appellate court to apply state law as it exists at the time of appeal, not as it existed at the time of trial.

In this case, the Court of Appeals recognized that its decision conflicted with the law of Florida. That awareness of conflict is evidenced by the court's deleting portions of its opinion without any statement that the deleted portions were contrary to the record or otherwise inaccurate. In its opinion denying rehearing, the Court of Appeals attempted to justify its result by reference to the pretrial stipulation. That stipulation, however, cannot justify the court's refusal to follow state law. In the first place, the stipulation was an agreement on the applicability of the rule of a manufacturer's vicarious liability for negligence or breach of warranty by third parties, which was and remains the law of Florida. It was not a stipulation of fact, and therefore cannot supply evidence of fault missing from the record. Secondly, the stipulation had no application to punitive damages, being limited to negligence and breach warranty, and having been entered into four months before any claim for punitive damages was made.

While this is a diversity case, the issue involved is not whether state law was correctly applied to the facts. The issue is whether the Court of Appeals complied with federal law and the decisions of this Court in deciding the case. In diversity cases, federal courts are bound by state law. Any other rule would lead to confusion and injustice as the result of inconsistent federal and state interpretations of state law. The Rules of Decision statute and decisions of this Court express the federal policy that the outcome of a case governed by state law should be the same whether the case is tried in federal or state court. Otherwise, certainty in the law is lost, and the door is opened for forum shopping by the parties.

If this case had been tried in state court, the punitive damage award would have been reversed on the authority of *Mercury*

Motors for the lack of evidence of fault on the part of Honda because the law of Florida is that an appellate court must apply the law as it exists at the time of appeal. *Hendeles* v. *Sanford Auto Auction, Inc.*, 364 So.2d 467 (Fla. 1978).

In *Vandenbark* and *Huddleston* this Court granted certiorari to review decisions of courts of appeals which had failed to follow controlling decisions of state supreme courts issued while the appeal was pending. This Court should also grant certiorari in this case. The opinion of the Court of Appeals on rehearing recognized the requirements of *Mercury Motors*. In its original opinion it had ruled that the implication that the liability of Honda had arisen out of its own faulty conduct in "adopting" the design was "not supported by the evidence." 655 F.2d at 660. The Fifth Circuit's action in reinstating punitive damages where there was no evidence of fault on the part of Honda and contrary to the law of Florida, and ruling that it was "too late" for Honda to rely on *Mercury Motors*, is diametrically opposed to the decisions of this Court in *Vandenbark* and *Huddleston*, and is contrary to 28 U.S.C. § 1652. The opinions in this case stand as controlling, but contradictory, precedent with *Mercury Motors* for the district courts of Florida. Florida is a large and growing commercial state. Litigation over products liability, and the availability of punitive damages in such cases, is a significant and increasingly important area of state law. Federal courts should not be allowed to ignore the decisions of the state supreme court on these points, and thereby frustrate the policies of the state with respect to liability for punitive damages.

2. The Decision Of The Court Of Appeals Raises A Significant Due Process Question By Shifting The Burden Of Proof On An Essential Element Of The Claim.

The allocation of the burden of proof on the plaintiff to establish every element of his claim essential to recovery is a fundamental part of the civil trial system in this country, and as

such is part of the due process guarantee of the Constitution. This Court has held unequivocally that the prosecution's burden of proving every fact necessary to constitute the crime charged is required by the Due Process Clause. *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). Because the Due Process Clause applies to the deprivation of property, as well as liberty, it is unconstitutional for a court to deprive a defendant of his property by a judgment when the plaintiff has not proved every fact necessary to recover on the claim.

In this case, the Court of Appeals has shifted the burden of proof from the plaintiff to the defendant because by reinstating punitive damages where the evidence did not distinguish any faulty conduct by Honda it has placed the consequences of the lack of evidence on the defendant. This violates due process requirements where proof of some fault on the part of Honda was an essential element of the claim for punitive damages.

This is not a case where the issue is whether the evidence was sufficient to prove an essential element of the claim, for the Fifth Circuit ruled that there was no evidence of fault by Honda. In its original opinion, the Court of Appeals said that the claim that there was faulty conduct on the part of Honda was "not supported by the evidence." 655 F.2d at 660.

The Fifth Circuit decision is a precedent for all future punitive damages claims brought in the district courts of Florida. It allows plaintiffs to recover punitive damages in vicarious liability cases unless the defendant proves that it is without fault, for according to this decision, if the evidence does not distinguish between the principal and agent, the plaintiff may recover punitive damages. This result violates the fundamental, traditional process of civil trials; requires defendants to prove a negative proposition, and is directly contrary to the law of Florida which requires the plaintiff to prove fault on the part of the principal before the principal may be vicariously liable for punitive damages. *Mercury Motors*, 393 So.2d at 549.

It was a decision of the Fifth Circuit shifting the burden of proof which this Court granted certiorari to review, and reversed, in *Texas Dept. of Community Aff.* v. *Burdine*, 450 U.S. 240, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

This Court should grant certiorari in this case because the decision removes from all future plaintiffs in the district courts of Florida the burden of proving some fault on the part of a principal in order to recover punitive damages. Removing a plaintiff's burden of proving an essential element of a claim is a denial of due process, and establishes a system in Florida in which a plaintiff may avoid the substantive requirements of Florida law by filing in federal court.

3. The Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The foundation of appellate proceedings in this country is the reasoned application of principles of law to the facts established in the record. In this case, the Court of Appeals ignored the record and the law of Florida to reach a particular result through the exercise of raw judicial power by deleting the portion of the opinion which showed that the evidence was contrary to the result reached.

In its original opinion the Fifth Circuit ruled that there was no evidence of faulty conduct on the part of Honda. 655 F.2d at 660. The opinion denying rehearing sets out the requirement of Florida law that there must be some fault on the part of the principal before the principal may be held vicariously liable for punitive damages. 670 F.2d at 22. The second opinion also noted Honda's position that the original opinion excluded the possibility of fault on its part. 670 F.2d at 22. With no attempt to reconcile the conflict between its decision and controlling state law, the Court of Appeals took the extraordinary step of "deleting" all the language finding no evidence of fault on the part of Honda from its decision.

Changing the language of the opinion, however, does not change either the lack of evidence or the law. It is only a transparent effort to avoid having to apply *Mercury Motors* and reverse the award of punitive damages. The displeasure of the Fifth Circuit with the potential effect of *Mercury Motors* on this case is best illustrated by its pejorative reference to that decision as an "escape hatch." 670 F.2d at 22.

Even though Florida law requires proof of fault on the part of a principal, and in spite of its own recognition that there is no evidence of fault on the part of Honda, the Court of Appeals reinstated the punitive damage award against Honda. This result cannot be justified on the basis of the pretrial stipulation since that stipulation was not a stipulation of fact and therefore could not supply unproved facts, and since it had nothing to do with punitive damages which were not even claimed until four months after the stipulation.

The actions of the Court of Appeals are without justification and cannot but undermine confidence in the judicial system. This Court should grant certiorari and review the decision in this case.

4. The Decision Below Raises A Significant Question Concerning The Imposition Of Punitive Damages On A Manufacturer Which Complies With The National Traffic And Motor Vehicle Safety Act Of 1966, 15 U.S.C. § 1381 et seq.

This is apparently the first case in which a federal court has allowed punitive damages where the vehicle complied with all applicable federal standards. The "crashworthiness" of automobiles and claims for punitive damages for design defects is a growing area of litigation. Congress has undertaken preemptive regulation of automobile safety standards pursuant to 15 U.S.C. § 1392(d). Standards established pursuant to the statute are to be reasonable. 15 U.S.C. § 1392(f)(3), and are minimum standards for performance which protect against unreasonable risk of injury. 15 U.S.C. §§ 1391(1) and (2). The purpose of

the statute and regulations is to reduce death and injuries resulting from traffic accidents, and to provide a uniform system of national safety standards. 15 U.S.C. §§ 1381 and 1392(d); Senate Report No. 1301, 1966 *U.S. Code Congr. & Admin. News*, p. 2709 at 2712.

In this case the Court of Appeals pointed to the design of the seat belts and seat assembly as causal factors of Mr. Dorsey's injuries unrelated to the size of the automobile. Both of these were governed by federal standards and the Honda AN 600 complied with these regulations. There was no issue at trial over the reasonableness of the standards, and the Plaintiff's own expert testified that meeting federal standards is generally recognized as reasonable compliance in design [T.T. Vol. III, p. 113].

The federal statute does provide that compliance with federal standards does not exempt any person from any common law liability. 15 U.S.C. § 1397(c). Senate Report No. 1301 stated, "[T]he federal minimum safety standards need not be interpreted as restricting state common law standards of care." 1966 *U.S. Code Congr. & Admin. News*, p. 2720. However, the federal statute also prohibits any state from establishing any safety standard not identical with the federal standard, except for cars purchased by the state. 15 U.S.C. § 1392(d). This precludes even more stringent standards.

It is incongruous that compliance with federal standards which by statute are required to be reasonable minimum standards of performance which protect against unreasonable risk of injury to persons involved in accidents, and which are preemptive, can result in a finding not only of a lack of reasonable care by the manufacturer, but also of a lack of any care, a necessary finding for the imposition of punitive damages. The ultimate effect of jury verdicts arrived at under different state laws and reaching beyond the federal standards is the imposition of conflicting standards on manufacturers, especially where the

causal factors of injury are covered by federal standards with which the manufacturer complied, as in this case. *See, Seese* v. *Volkswagenwerk, A.G.*, 648 F.2d 833, 855 (3d Cir. 1981) (Adams, J., dissenting), *cert. den.* ____ U.S. ____ , 102 S.Ct. 330 (1981). This result is contrary to the preemptive provisions of 15 U.S.C. § 1392(d), and frustrates the congressional purpose of uniform national regulation.

Because the issue of the effect of compliance with this federal statute will undoubtedly be raised more frequently in both state and federal courts as crashworthiness litigation increases, the Court should grant certiorari in this case to clarify the fedeal law and to provide for certainty and uniformity in the cases certain to follow.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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June 7, 1982

APPENDIX

GLEN K. DORSEY, JR. and Barbara J. Dorsey, his wife,
Plaintiffs-Appellants Cross-Appellees,
v.
HONDA MOTOR COMPANY LTD. *et al.*,
Defendants-Appellees Cross Appellants.
HONDA MOTOR COMPANY LTD.,
Defendant-Appellant Cross Appellee,
v.
CONTINENTAL CASUALTY COMPANY,
Defendant-Appellee Cross-Appellant.

No. 79-3845.

United States Court Of Appeals,
Fifth Circuit.
Unit B

Sept. 11, 1981.

Frates, Floyd, Pearson, Stewart, Richman & Greer, Gary D. Fox, Larry S. Stewart, Miami, Fla., for plaintiffs-appellants-cross appellees.

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DeWolf, Ward, Morris, Wohlust, Jontz & O'Donnell, John L. O'Donnell, Jr., Thomas B. DeWolf, Orlando, Fla., for Honda Motor Company Ltd.

Akerman, Senterfitt & Eidson, John Edwin Fisher, Orlando, Fla., for Continental Cas. Co.

Joe N. Unger, Miami, Fla., for Honda Motor Co. Ltd., American Honda Motor and Mission Ins.

Appeals from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, and MORGAN and HENDERSON, Circuit Judges.

GODBOLD, Chief Judge:

Plaintiff, Glen K. Dorsey, Jr., suffered serious injuries when his 1971 Honda AN 600, a small automobile, collided with a full size Ford. In this Florida diversity case Dorsey and his wife Barbara sued the manufacturer, Honda Motor Company Ltd., (Honda), and the distributor, American Honda Motor Company, on several alternative grounds: negligent design, [1] negligent failure to warn of defects, strict product liability, and breach of implied warranty. Dorsey also joined as defendant Continental Casualty Company, Honda's liability insurer, as permitted under Florida law. [2] Continental acknowledges that if punitive damages are properly awarded against Honda and if such damages are covered by one of the liability insurers, it will be the insurer responsible.

The jury returned Rule 49 special verdicts in plaintiffs' favor on all theories of liability, and a special verdict finding that in the manufacture and distribution of the automobile Honda Motor Company acted "with wantonness, willfulness or reckless indifference to the rights of others." The jury awarded compensatory damages of $750,000 to Glen and $75,000 to Barbara and punitive damages to Glen of $5,000,000. [3] On motion for judgment n. o. v. the judge let stand the compensatory damages but set aside the punitive damages and entered a judgment under Rule 54(b) on the liability and damage issues.

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[1] The jury was instructed on negligent design with respect to the manufacturer only.

[2] Florida law permits joinder of an insurer as a codefendant. *See Shingleton* v. *Bussey*, 233 So.2d 713 (Fla. 1969); *Beta Eta House Corp.* v. *Gregory*, 237 So.2d 163 (Fla. 1970).

[3] The jury awarded punitive damages against the manufacturer only. The plaintiffs did not seek punitive damages against the distrubutor.

The judge did not submit to the jury issues relating to coverage by Continental Casualty but, as permitted by Rule 49, entered non-jury findings and conclusions on these issues. Although the court had set aside the punitive damages awarded by the jury, for economy of judicial effort in case punitive damages were reinstated on appeal, the court held that Continental could not be liable under its policy for the punitive damage award, if reinstated. A second judgment was entered on these non-jury issues.

On appeal Dorsey asserts as error the judgment n. o. v. taking away punitive damages. By cross-appeal Honda contends that it was entitled to a directed verdict on liability issues, and that the district court erred in ruling that as a matter of law the insurance policy would not cover punitive damages.

We hold: (1) the court did not err in denying Honda's motion for directed verdict on liability; (2) the court erred in setting aside the punitive damages on motion for judgment n. o. v. and, therefore, we direct entry of judgment for Dorsey for the punitive damages awarded by the jury; (3) the holding that Continental is not liable for the punitive damage award is reversed and remanded for further consideration.

I. THE FACTS

The following are the facts in the light most favorable to Dorsey, considered for the purpose of determining whether Honda was entitled to a directed verdict on liability and whether the judge erred in setting aside the award for punitive damages.

In the mid-1960's Honda developed a small, light-weight automobile with high gas mileage. It exported the vehicle to the United States and Europe to meet the demand for a low-price, economical car. The model sold in the United States, the AN 600, was the first automobile sold by Honda in this country. It weighed approximately 1,356 pounds.

Glen K. Dorsey purchased a new 1971 Honda AN 600 in early 1972. He chose the vehicle because it was economical and offered high gas mileage. Dorsey, who is approximately 6 ft. 1½ in. tall, testified that he found the vehicle comfortable to drive and that it had

adequate head and leg room. Dorsey was unaware of the AN 600's specific crash characteristics although he had a general awareness that if a large sedan hit a small vehicle such as a Honda the small vehicle might be severely damaged.

In March 1972 Dorsey's AN 600 collided with a standard size Ford automobile weighing approximately 3,600 pounds. The Honda was traveling at approximately 30 m.p.h. The Ford had braked and was barely moving, at 3 to 5 m.p.h. Dorsey was wearing his lap and shoulder belts and was driving with due care. In the collision, the left "A pillar," the post at the left of the windshield and between the windshield and window, deformed rearward more than ten inches. Dorsey's seat came off its track, ramming him forward and to the left. His seat belt did not adequately restrain him in the collision. Dorsey's legs were jammed against the front of the passenger compartment, causing compound fractures, and his head hit the deformed A pillar, causing massive permanent brain injury. This accident was the equivalent of a 20 m.p.h. barrier crash.[4]

Before Honda began exporting the AN 600 to the United States employees of its wholly owned subsidiary, Honda Research and Development (Honda R&D) conducted crash tests on prototype vehicles in Japan. Honda R&D is not a party to this suit. These tests revealed that a dummy the size of an average adult male, restrained with lap and shoulder belts, would strike the interior front part of the passenger compartment in a 30 m.p.h. barrier crash test. In both a barrier crash test and a test collision against an average size American vehicle the dummy's head struck the A pillar, which had deformed inward. Despite the results of these tests and a recommendation by an employee of Honda R&D to enlarge the vehicle to improve safety, Honda exported the AN 600 to the United States without increasing the vehicle's size or body strength or warning purchasers of its crash characteristics.

In considering the sufficiency of the evidence to support the jury finding of willful, wanton or reckless conduct, it is of no moment that the substantial evidence of such conduct relates to employees of

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[4] Barrier crash tests involve head-on collisions against a concrete wall.

Honda R&D. In the pre-trial order joined in by plaintiffs, Honda and Continental, it was agreed that Honda contended:

> that the vehicle manufactured by Honda Motor Company Ltd. was reasonably designed and manufactured and that Honda Motor Company, Ltd. used reasonable care in the design and testing of all the composite safety features incorporated in the vehicle.

The following principles of law were agreed upon:

> 1. Honda Motor Company Ltd., as the manufacturer is liable for any negligence of [sic—"or"] breach of warranty with respect to any component part which is defectively designed and manufactured even though such part may have been obtained from a third-party supplier.
>
> 2. Honda Motor Company Ltd. as manufacturer, impliedly warranted that the vehicle involved in this action was reasonably crashworthy, i.e., that reasonable care had been used in the design and manufacture of the car to eliminate unreasonable risk of foreseeable injury.
>
> 3. Honda Motor Company Ltd., as manufacturer, is strictly liable in tort if it placed on the market a product that is defective, i.e., unreasonably dangerous in that it failed to eliminate unreasonable risk of foreseeable injury.
>
> 4. Honda Motor Company Ltd., as a manufacturer, is under a duty to warn of any dangers inherent in the use of its vehicles in order to eliminate unreasonable risk of foreseeable injuries.

An issue of fact to be litigated was described as:

> Whether reasonable care was used in the design and testing of the car so as to eliminate unreasonable risk of foreseeable injury?

By the pre-trial order, Honda, knowing that design and testing of the car had been done by Honda R&D, accepted responsibility for the acts of Honda R&D in design and testing. Thus, in assaying the evidence of wrongful conduct the acts of Honda R&D are treated as the acts of Honda.

At trial experts testified to a number of measures that would improve the AN 600's safety in collisions. These included lengthening the hood, enlarging the passenger compartment, installing a

heavier engine, using heavier metals in construction, reinforcing the structure by using metal "bones" to fortify the passenger compartment and the A pillars, using a full frame out to the front bumper, redesigning the shoulder belt to reduce the likelihood of "submarining" the passenger, and making seat belts of a fabric with less elasticity.

The AN 600 design met certain federal Motor Vehicle Safety Standards in effect at the time governing seat assemblies, seat belt assemblies, fuel tank integrity, and displacement of the steering column. While the federal statute under which these regulations were passed preempts inconsistent state standards, 15 U.S.C. § 1392(d), compliance with the federal regulations "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c).

II. LIABILITY OF HONDA

[1] Honda contends that it was entitled to a directed verdict on all issues on the ground that the sole proximate cause of Dorsey's injuries was the comparative size of the two vehicles involved in the collision and that under so-called "crashworthiness" cases, notably *Dreisonstok* v. *Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974) (Virginia law), one who buys a small car because it is small cannot complain if he is injured as a consequence of the design characteristic—small size—that he sought. This argument is discussed and rejected below in part III, Punitive Damages.

III. PUNITIVE DAMAGES

The critical portion of the district court's order setting aside the punitive damages is this:

> In the present case, it was basically the diminutive size of the Defendant's product and the difference between its size and that of standard American vehicles which rendered the Defendant's vehicle unsafe in the event of a collision. See the testimony of James McElhaney, Plaintiff's expert. This source of potential harm, however, was obvious on casual observation. Mr. Dorsey recognized when he bought the automobile that it could sustain serious damage in the event of a collision with a larger automobile. Finally, the evidence in the present case indicates as mentioned above that the Defendants' vehicle was manufac-

> tured in accordance with all applicable United States Government standards. Under these circumstances, the conduct of the Defendant Honda cannot be said to fall within the ambit of those activities which under Florida law justify an award of punitive damages.

The basis for the district judge's judgment n. o. v. respecting punitive damages thus seems to be that a finding of recklessness was foreclosed as a matter of law because the basic safety problem was the vehicle's diminutive size and because the vehicle complied with federal Motor Vehicle Safety Regulations. Additionally, Honda argues that Florida would not permit punitive damages in a products liability case. We conclude that the district court erred in setting aside the award of punitive damages.

Diminutive size. Certainly the AN 600's diminutive size compared to a "standard" American vehicle was "obvious on casual examination." Dorsey acknowledged that he had bought the car because it was economical (and impliedly it was economical because small) and the he knew it might be severely damaged in a collision with a "standard size" car. The district court reasoned that the manufacturer could not be liable in damages for designing and selling a diminutive car to one who desired it because it was diminutive and who knew the risks from collision that were attendant to its size. The flaw in this reasoning, so far as this case is concerned, is the district court's characterization of the plaintiffs' claims as "basically" that the diminutive size of the AN 600 was so far different from the size of a standard American vehicle that the AN 600 was unsafe in a collision.

[2] The district court's cryptic holding presumably draws on the "crashworthiness" decisions which, speaking generally, interpret the extent of the automobile manufacturer's duty to design a vehicle that protects its occupants from injury in collisions not caused by a defect in the vehicle. Florida imposes on the automobile manufacturer a duty to use reasonable care to design and manufacture a vehicle that eliminates unreasonable risk of foreseeable injury to the occupants in the event of a collision. *Ford Motor Co.* v. *Evancho*, 327 So.2d 201 (Fla. 1976) (adopting the reasoning of *Larsen* v. *General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968)). The district court seemed to reason that the manufacturer does not violate this duty of

care when the design feature that poses a risk of injury should a collision occur (here the size of the car, according to the district court), is obvious, useful, and indeed intentionally selected by the purchaser, *see Dreisonstok* v. *Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974) (Virginia law). In *Dreisonstok*, the Fourth Circuit assumed that Virginia would adopt the "crashworthiness" rule of *Larsen* v. *General Motors, supra*, but held that the manufacturer did not violate any duty of ordinary care by designing a van that achieved the unique feature of maximum cargo space by advancing the driver's seat as far forward as possible, thereby eliminating the protection afforded passengers in a conventional car who are "in the middle of the vehicle" protected by the engine and hood in front of them.

Reliance on *Dreisonstok* is based on a misconception of the plaintiffs' case. The plaintiffs' challenge is not directed to the AN 600's diminutive size but to design features other than the size of the vehicle.

[3] There was evidence sufficient for the jury to find causal factors of injury other than size of the vehicle. The evidence supported a conclusion that although this was a relatively moderate collision the A pillar deformed inward and Dorsey's seat assembly broke lose from its moorings and jammed him forward, which fractured his legs and impelled his head against the deformed A pillar. The safety of the seat assembly has no necessary relation to the size of the car. Nor was the A pillar's deformation necessarily related to the size of the car. Reinforcing the car with metal bones would not require increasing the size of the car, nor would changing the frame design or installing a larger engine. There was evidence that Honda used lighter gauge metal than some other small car manufacturers, which again is unrelated to size. Finally, the jury could find that the seat belts were unduly elastic in comparison to the small size of the passenger compartment, permitting excess frontward movement before restraining the user, and that less elastic materials were available. Adopting a different seat belt material would not require enlarging the car. In short, Dorsey's experts identified several deficiencies unrelated to size. Dorsey's willingness to buy a car with a small passenger

compartment is not a willingness to be supplied with a passenger compartment that is negligently designed or defectively constructed.

We thus do not need to decide whether and to what extent Florida would adopt *Dreisonstok*.[5] That case only involved a contention that one structural configuration should have been chosen over another. Moreover, "[t]here was no evidence in the record that there was any practical way of improving the 'crashability' of the vehicle that would have been consistent with the peculiar purposes of its design." 489 F.2d at 1074. In the case before us more is involved than choosing a small car over one of "standard" size. There is substantial evidence that tests carried out by Honda demonstrated that, apart from being small, the AN 600 had serious design deficiencies creating unreasonable risk of harm to passengers. Moreover, there was testimony, some of it from Honda's own engineers, that there were practical ways of improving its "crashability" that would have been consistent with the "peculiar purposes of its design," diminutive size.

The foregoing evidence was submitted to the jury under unexceptionable instructions governing willful and wanton conduct. The jury found wantonness, willfulness or reckless indifference to the rights of others. Under *Boeing Co.* v. *Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc), the evidence permitted the jury to reach this conclusion.

Compliance with government standards. The district court determined that compliance with federal safety standards precluded an award of punitive damages. Reliance upon this argument is questionable because Honda did not articulate the compliance argument in its motion for directed verdict, offered no jury instruction on the point, and at the charge conference told the court that it did not contend that compliance with the federal safety standards proved it did not do anything wrong. However, it seems that the court concluded that compliance with these standards negates recklessness as a matter of law. We disagree.

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[5] *Nicolodi* v. *Harley-Davidson Motor Co.*, 370 So.2d 68 (Fla.Dist.-Ct.App. 1979), held that the crashworthiness doctrine applies to motorcycles, reversing a trial court's dismissal of a complaint alleging that a motorcycle should have been designed to protect a passenger's legs from injury in a collision.

As an initial matter we note that 15 U.S.C. § 1397(c) provides that compliance with the federal regulations "does not exempt any person from any liability under common law." Honda cites no support for its contention that liability under common law does not mean liability for punitive damages under common law. We do not rest our decision on this statute, however, because the purpose of § 1397(c) may be to disclaim any intent to preempt state common law theories of product liability in the automotive design area rather than to mandate that the factfinder in a common law action may not consider compliance as evidence of care if state law permits that argument. *Cf.* S.Rep. 1301, 89th Cong., 2d Sess., *reprinted in* [1966] U.S.Code Cong. & Ad.News 2709, 2720.

[4] Generally speaking, compliance with regulatory standards may be admissible on the issue of care but does not require a jury to find a defendant's conduct reasonable. *See* Restatement (Second) of Torts § 288C; W. Prosser, Handbook of the Law of Torts § 36 at 203-04 (4th ed. 1971); *Bruce* v. *Martin-Marietta Corp.*, 544 F.2d 442, 446 (10th Cir. 1976) (Maryland law); *Salmon* v. *Parke, Davis & Co.*, 520 F.2d 1359, 1362 (4th Cir. 1975) (North Carolina law); *Raymond* v. *Riegel Textile Corp.*, 484 F.2d 1025, 1027 (1st Cir. 1973) (New Hampshire law). Honda offers no persuasive reason why compliance will as a matter of law be merely admissible on the issue of whether the defendant's conduct is reasonable but an absolute defense on the issue of whether its conduct is willful, reckless, or outrageous. *See Silkwood* v. *Kerr-McGee Corp.*, 485 F.Supp. 566, 583-86 (W.D.Okl. 1979) (compliance with federal standards does not prevent awarding punitive damages if the defendant's conduct is reckless); *Gryc* v. *Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.), *cert. denied*, 449 U.S. 921, 101 S.Ct. 320, 66 L.Ed.2d 149 (1980).

[5] Moreover, the federal Motor Vehicle Safety Act Standards are unrelated to several of the design deficiencies developed by the plaintiffs' evidence. The district judge's opinion presumably refers to evidence of compliance with MVSS 204, governing displacement of the steering wheel, MVSS 207, governing strength of the seat assembly, MVSS 209, governing the strength and elasticity of the seat belts, MVSS 210, governing seat belt assembly anchorages, and MVSS 301, governing vulnerability of the fuel tank. While the regulations governing seats and seat belts are relevant to portions of

the plaintiffs' case, none of the regulations applicable to Dorsey's car governed the strength of the A pillar or the overall ability of the passenger compartment to protect occupants in a crash.* Furthermore, plaintiffs' expert explained that compliance with the standard governing seat belt stretch would be meaningless in terms of safety if the car was designed to place the driver's head so close to the front of the passenger compartment that it would be vulnerable in a crash. In short, we believe that Florida would not hold as a matter of law that compliance with the applicable regulations, which were far from comprehensive, precluded any finding of recklessness no matter how egregious Honda's conduct had been in ignoring tests that indicated design flaws of a different nature.

[6] *Propriety of punitive damages in a products liability case.* Finally, Honda urges that punitive damages are not available in this case because liability in a "products liability" case is predicated on the nature of the product and not on the character of the defendant's actions, whereas in assessing punitive damages the character of the act is paramount. This is not a pure negligent design case or a pure products liability case based on no more than a theory of strict liability. The evidence permitted the jury to find that defendant knew that it was creating unreasonable risks not necessarily incident to the unique design desired by the purchaser and received recommendations for eliminating or minimizing these unreasonable risks but did not accept them. The jury not only returned separate special verdicts against the defendant on strict liability, implied warranty, negligent design, and negligent failure to warn, but also returned a finding that Honda had acted with "wantonness, willfulness or reckless indifference to the rights of others." The punitive damage award is thus based directly upon the nature of Honda's conduct. Thus we do not face whether Florida would permit punitive damages in a so-called "products liability" case where the defendant was guilty of only negligent design or where liability was based solely upon strict liability in tort.

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* MVSS 208, a test governing the passenger compartment's overall ability to protect passengers in a crash, did not apply to automobiles manufactured prior to January 1, 1972. *See* C.F.R. § 571.208. Dorsey's car was manufactured June 11, 1971.

Honda further contends that because there are no Florida products liability cases awarding punitive damages Florida, "by negative implication," would deny punitive damages in this type of case. The Florida opinions that Honda cites do not indicate that punitive damages had been sought. *See West* v. *Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976); *Ford Motor Co.* v. *Evancho*, 327 So.2d 201 (Fla. 1976); *Tampa Drug Co.* v. *Wait*, 103 So.2d 603 (Fla. 1958); *Nicolodi* v. *Harley-Davidson Motor Co.*, 370 So.2d 68 (Fla. Dist. Ct. App. 1979); *Sansing* v. *Firestone Tire & Rubber Co.*, 354 So.2d 895 (Fla. Dist. Ct. App.), *cert. denied*, 360 So.2d 1250 (Fla. 1978); *Clement* v. *Rousselle Corp.*, 372 So.2d 1156 (Fla. Dist. Ct. App. 1979), *cert. denied*, 383 So.2d 1191 (Fla. 1980). Those cases therefore do not appear to address the questions.[7]

We believe that Florida would permit punitive damages in this case. For nearly a century it has been recognized in Florida that punitive damages may be awarded when, inter alia, the defendant's conduct shows wantonness or recklessness or reckless indifference to the rights of others, *Florida Southern Railway* v. *Hirst*, 30 Fla. 1, 11 So. 506 (1892). Florida courts have permitted punitive damages in a wide range of tort cases where the plaintiff establishes such conduct. *See, e.g., Ingram* v. *Pettit*, 340 So.2d 922 (Fla. 1976) (injuries caused by intoxicated driver); *Campbell* v. *Government Employees Insurance Co.*, 306 So.2d 525 (Fla. 1974) (insurer's refusal to settle claim); *Buie* v. *Barnett First National Bank of Jacksonville*, 266 So.2d 657 (Fla. 1972) (bank wrongfully repossessed plaintiff's automobile); *La Porte* v. *Associated Independents, Inc.*, 163 So.2d 267 (Fla. 1964) (employee threw garbage can at plaintiff's dog, killing it);

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[7] While no Florida decision squarely addresses the availability of punitive damages as a general matter in products liability litigation, dictum in *Campbell* v. *Government Employees Insurance Co.*, 306 So.2d 525, 531 (Fla. 1974), noted the thalidomide drug cases in illustrating the range of cases in which courts have awarded punitive damages. *Auto Specialities Manufacturing Co.* v. *Boutwell*, 335 So.2d 291 (Fla.Dist.Ct.App.), *cert. dismissed*, 341 So.2d 1080 (Fla. 1976), upheld a trial judge's decision to set aside a jury verdict for punitive damages in a products liability case because there was insufficient evidence of recklessness without questioning the broader propriety of punitive damages were recklessness established.

Ocean Mile Galleries, Inc. v. *Huguenor*, 351 So.2d 1043 (Fla. Dist. Ct. App. 1977) (misrepresentations in sale of jewelry); *Doral Country Club, Inc.* v. *Lindgren Plumbing Co.*, 175 So.2d 570 (Fla. Dist. Ct. App.) (conversion of plumbing supplies), *cert. denied*, 179 So.2d 212 (Fla. 1965). *Cf. ABC-Paramount Records, Inc.* v. *Topps Record Distributing Co.*, 374 F.2d 455 (5th Cir. 1967) (Florida law; wrongful interference with contractual relationship). Punishment and deterrence, the basis for punitive damages in Florida as elsewhere, *see Campbell*, 306 So.2d at 531, are no less appropriate with respect to a product manufacturer who knowingly ignores safety deficiencies in its product that may endanger human life than in the cases described above. [8]

Many other jurisdictions have permitted punitive damages in products liability cases upon a proper showing of outrageous or reckless conduct. *See Gillham* v. *Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975) (Ohio law), *cert. denied*, 424 U.S. 913, 96 S.Ct. 1113, 47 L.Ed.2d 318 (1976); *Hoffman* v. *Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973) (Pennsylvania law); *Grimshaw* v. *Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981); *petitions for hearing filed*, (Cal. July 7, 1981); *Leichtamer* v. *American Motors Corp.*, No. 5223 (Ohio Ct. App. July 30, 1980) (awarding punitive damages

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[8] The conclusion that we have reached is reinforced by a decision of the Florida Court of Appeals handed down since the preparation of this opinion. *American Motors Corporation* v. *Ellis*, 403 So.2d 459, 6 Fla.Law Weekly, 1808 (Fla.Ct. of App., 5th District, 8/14/81). Plaintiffs contended that the manufacturer of their automobile acted with knowledge and reckless indifference to the rights and safety of others with respect to the design of the gasoline tank. The trial court granted a directed verdict against plaintiffs on their claim for punitive damages. The Court of Appeals reversed, holding that the jury could have found that the manufacturer was aware of the catastrophic results of fuel tank fires in its vehicle from its own crash tests and chose not to implement the recommendations of its engineers to relocate the fuel tank. While there was evidence that the choice to retain the location was a valid business judgment the jury could reasonably infer that the manufacturer was aware that the fuel tank was defective and dangerous but chose not to seek a safer alternative design. In view of this available inference the directed verdict was error and a new trial on punitive damages was required.

in a "crashworthiness" case), *affirmed*, 424 N.E.2d 568 (Ohio 1981); *Wangen* v. *Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437, 444 (1980) (awarding punitive damages in a "crashworthiness" case); *Wussow* v. *Commercial Mechanisms, Inc.*, 97 Wis.2d 136, 293 N.W.2d 897 (1980); *Vollert* v. *Summa Corp.*, 389 F.Supp. 1348 (D. Hawaii 1975); *Drake* v. *Wham-O Manufacturing Co.*, 373 F.Supp. 608 (E.D.Wis. 1974); *Gryc* v. *Dayton-Hudson Corp.*, 297 N.W.2d 727, 732-33 (Minn.), *cert. denied*, 449 U.S. 921, 101 S.Ct. 320, 66 L.Ed.2d 149 (1980); *Sturm, Ruger & Co.* v. *Day.*, 594 P.2d 38, 46-47 (Alaska 1979); *Toole* v. *Richardson-Merrell Inc.*, 251 Cal.App.2d 689, 60 Cal.Rptr. 398 (1967); *Moore* v. *Jewel Tea Co.*, 116 Ill. App.2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill.2d 288, 263 N.E.2d 103 (1970); *Rinker* v. *Ford Motor Co.*, 567 S.W.2d 655, 668-69 (Mo.App. 1978). *Cf. American Laundry Machinery Industries* v. *Horan*, 45 Md.App. 97, 412 A.2d 407, 419-20 (Md.Ct.-Spec.App. 1980) (punitive damages available in products liability action upon sufficient showing of recklessness, but finding insufficient evidence of recklessness).

IV. LIABILITY OF CONTINENTAL CASUALTY

Continental is a participant in a complicated and sophisticated insurance program involving several layers or levels of primary and excess insurance. It is the liability insurer covering Honda for losses in excess of coverage provided by underlying policies with other insurers. Continental acknowledges that it is the insurer responsible for covering the punitive damage award.

The remaining issue concerns whether Florida's public policy that one may not insure against punitive damages precludes a finding that Continental is liable under its policy for the punitive damages awarded against Honda. The key to this question is whether Honda's liability for punitive damages is premised on its own fault or is merely vicarious.

[7] Honda's initial argument is procedural. It contends that Continental's failure specifically to plead illegality as an affirmative defense under Rule 8(c) foreclosed any consideration of the coverage issue. With this we disagree. The pleadings sufficed to raise in-

surance coverage as an issue in the case. The plaintiffs claimed compensatory damages and asserted the liability policy as the basis for Continental's joinder in the action and its potential liability. By an amended complaint plaintiffs requested punitive damages as well. We agree with the district court that Continental was not required to plead a conclusion of law to the effect that it might be liable to cover compensatory damages if awarded but not punitive damages.

[8] Continental's failure to request from the jury a special verdict concerning the coverage issue did not foreclose it from requesting the trial judge to determine the issue in post-trial proceedings. Under Rule 49, if the jury's special verdicts do not cover an issue of fact raised by the pleadings, the remaining issue is for the judge to determine. The trial judge correctly proceeded to determine the issue of coverage.

[9, 10] We are not able, however, to affirm the trial judge's determination that as a matter of fact and law Florida's public policy forbids insurance coverage of the punitive damages awarded against Honda. The basic rule of Florida law is that public policy forbids insurance coverage of punitive damages in order that the punitive and deterrent purposes of these damages will not be thwarted. *Northwestern National Casualty Co.* v. *McNulty*, 307 F.2d 432 (5th Cir. 1962); *Nicholson* v. *American Fire & Casualty Insurance Co.*, 177 So.2d 52 (Fla.Dist.Ct.App. 1965). Florida's intermediate appellate courts, however, have permitted insurance coverage of punitive damages where the insured party was not itself at fault but was merely vicariously liable for punitive damages based on the reckless conduct of another. *See Hartford Accident & Indemnity Co.* v. *U.S. Concrete Pipe Co.*, 369 So.2d 451, 452-53 (Fla.Dist.Ct.App. 1979) (respondeat superior); *Travelers Insurance Co.* v. *Wilson*, 261 So.2d 545 (Fla.Dist.Ct.App. 1972); *Sterling Insurance Co.* v. *Hughes*, 187 So.2d 898 (Fla.Dist.Ct.App.) (respondeat superior), *cert. denied*, 194 So.2d 622 (Fla. 1966). Honda's post-trial argument contended: any recklessness proved by the plaintiff was that of Honda R&D, the wholly owned subsidiary, rather than of Honda Motor, the defendant; punitive damages were therefore awarded against Honda Motor on a theory of vicarious liability; insurance coverage was therefore permissible.

The district court accepted these legal premises but ruled that the policy of *Northwestern National Casualty Co.* v. *McNulty* forbade insurance coverage on the facts of this case:

> In the present case, Honda's liability arose out of the adoption of a particular automotive design and the sale of its product manufactured under same. This conduct could not be deemed passive under any view of the evidence or the exception to the *McNulty* policy developed by Florida appellate courts. On the present record, the reasons for the *McNulty* policy clearly apply and any liability for punitive damages arising out of the present case many not be imposed on the insurance company defendants.

The reference to "adoption" of a design by Honda and subsequent manufacture and sale under this design seems to us to refer to conduct by Honda itself as opposed to conduct of employees of Honda R&D. The description of this conduct — adoption, manufacture and sale — as not "passive" implies that liability of Honda arose out of its own "active" (and faulty) conduct as opposed to vicarious liability because of acts done by Honda R&D.

Thus construed the order is not supported by the evidence. The substantial evidence of conduct willful, wanton, or in reckless disregard of the rights of others concerns actions and failures of Honda R&D and its employees. Neither Continental nor the district court points us to substantial evidence that any responsible person of Honda was reckless or even that any such person had knowledge of the results of the tests conducted by Honda R&D or of the recommendations of Honda R&D employees that the design of the AN 600 be changed. The liability of Honda is, therefore, not based upon its own acts but upon those of Honda R&D and its employees, for which Honda in the pre-trial order, accepted responsibility. Absent the pre-trial order, plaintiffs would have been required to prove the existence of a relationship between Honda and Honda R&D that would make Honda responsible for acts of Honda R&D and its employees. There was not such proof.

This takes us to the issue of whether, in the absence of such proof, the pre-trial order, joined in by Continental, operates to establish the existence of a relationship that is either within, or without, the vicarious liability exception to Florida's policy that one may not

insure against punitive damages. It may be contended that the pretrial order is an acceptance by Honda of vicarious responsibility for acts of Honda R&D and its employees. Also it can be argued that the order is merely a recognition by Honda that Honda R&D is a "mere instrumentality" of Honda. *See Bendix Home Systems, Inc.* v. *Hurston Enterprises, Inc.*, 566 F.2d 1039, 1041 (5th Cir. 1978) (Fla. law); *St. Petersburg Sheraton Corp.* v. *Stuart*, 242 So.2d 185, 190 (Fla.Dist.Ct.App. 1970). *Cf. Markow* v. *Alcock*, 356 F.2d 194, 197-98 (5th Cir. 1966); Annot., 7 A.L.R.3d 1343 (1966). Evidence concerning the relationship between parent and subsidiary was skimpily developed at trial. The record discloses that Honda R&D is a wholly owned subsidiary of Honda and that the current chief engineer of Honda R&D testified, regarding the function of the laboratory he directs, that "to Honda Companies which manufacture cars, we sell blueprints." It is not beyond possibility that Honda accepted responsibility for Honda R&D's acts as a tactical matter or because it did not want the relationship between the two companies publicly aired, but we find nothing in the record on these possibilities.

Determination of the Honda-Honda R&D relationship, and of the consequences of it under the vicarious liability exception to the Florida policy against insuring against punitive damages, must be addressed by the district court in the light of this opinion. We note Florida cases addressing an insurance company's liability for punitive damages in the face of an equivocal verdict. *See Morrison* v. *Hugger*, 369 So.2d 614 (Fla.Dist.Ct.App. 1979), holding that if it is not possible to tell whether a jury rendered its verdict on a vicarious liability theory or another theory the insurer is responsible for punitive damages. The applicability of these cases is for the district court in the first instance.

AFFIRMED in part, REVERSED in part, and REMANDED with directions to reinstate the punitive damages award in favor of plaintiff Glen K. Dorsey, Jr. and for further proceedings not inconsistent with this opinion.

GLEN K. DORSEY, JR. and Barbara J. Dorsey, his wife,
Plaintiffs-Appellants Cross-Appellees,

v.

HONDA MOTOR COMPANY LTD. *et al.*,
Defendants-Appellees-Cross Appellants.

HONDA MOTOR COMPANY LTD.,
Defendant-Appellant-Cross Appellee,

v.

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellee-Cross-Appellant.

No. 79-3845.

United States Court Of Appeals,
Fifth Circuit.*
Unit B

March 8, 1982.

Frates, Floyd, Pearson, Stewart, Richman & Greer, Gary D. Fox, Larry S. Stewart, Miami, Fla., for the Dorseys.

Anthony M. Lanzone & Associates, Anthony M. Lanzone, Robert A. Calinoff, New York City, DeWolf, Ward, Morris, Wohlust, Jontz & O'Donnell, John L. O'Donnell, Jr., Thomas B. DeWolf, Orlando, Fla., for Honda Motor Co. Ltd.

Akerman, Senterfitt & Eidson, John Edwin Fisher, Orlando, Fla., for Continental Cas. Co.

Joe N. Unger, Miami, Fla., for Honda Motor Co. Ltd., American Honda Motor and Mission Ins.

Appeals from the United States District Court for the Middle District of Florida.

*Former Fifth Circuit case, Section 9(3) of Public Law 96-452 — October 14, 1980.

Before GODBOLD, Chief Judge, MORGAN and HENDERSON, Circuit Judges.

ON PETITIONS FOR REHEARING PER CURIAM:

[1] Pending this appeal and a few days before the case was argued to us, the Supreme Court of Florida decided *Mercury Motors Express, Inc.* v. *Smith*, 393 So.2d 545 (Fla. 1981) in which the court said that before an employer may be held vicariously liable for punitive damages under the doctrine of respondeat superior, there must be "some fault" on the employer's part. [1]

Relying upon *Mercury Motors*, Honda urges by petition for rehearing that it cannot be held liable in punitive damages for acts done by Honda R&D because, it says, our opinion excludes the possibility that Honda was guilty of "some fault" of its own. Continental Casualty has also petitioned for rehearing, contending that *Mercury Motors* abolished Florida's vicarious liability exception to no insurance coverage for punitive damages.

[2] As we pointed out in our opinion, 655 F.2d 650 (5th Cir. 1981), by the pretrial stipulation Honda accepted that in legal effect the acts of Honda R&D and its employees were its own acts. Honda cannot escape the consequences of this pretrial acceptance of responsibility via the escape hatch of *Mercury Motors*. The issues having been drawn in this manner in the pretrial order, at trial the distinction between Honda and Honda R&D was blurred, and presumably no party saw any necessity of distinguishing clearly between what Honda did and what Honda R&D did. In the record it is often hard to tell which one of the family of Honda companies was being described, and no one treated such distinction as a matter of particular consequence. The case having been tried as laid out in the pretrial order, it is too late for Honda to say post-trial that there was insufficient evidence of its own fault independent of acts of Honda R&D and its employees to support the judgment against it for punitive damages.

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[1] Although the misconduct of the employee upon which the vicarious liability is based must be willful and wanton, the fault of the employer, independent of the employee's conduct, need be only "some fault" contributing to the plaintiff's injury. *Id.*

We therefore adhere to our holding that the court erred in setting aside the punitive damages award on motion for judgment n. o. v.

We modify our opinion by deleting that portion beginning near the botton of 655 F.2d 659, with the words "The district court accepted these legal premises . . ." and continuing through the rest of the opinion. We vacate the second judgment of the district court in which it held Continental was not liable to Honda for the punitive damages award and remand the case to the district court for it to determine afresh whether under the facts of this case and under Florida law Continental is liable to Honda.

The petitions for rehearing are DENIED.

AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED with directions to reinstate the punitive damages award in favor of plaintiff Glen K. Dorsey, Jr. and for further proceedings not inconsistent with this opinion.

GLEN K. DORSEY, JR. and Barbara J. Dorsey, his wife,
Plaintiffs-Appellants, Cross-Appellees,

v.

HONDA MOTOR COMPANY LTD. *et al.*,
Defendants-Appellees, Cross Appellants.

HONDA MOTOR COMPANY LTD.,
Defendant-Appellant,

v.

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellee, Cross-Appellant.

No. 79-3845.

United States Court Of Appeals,
Fifth Circuit.*
Unit B

April 30, 1982.

Frates, Floyd, Pearson, Stewart, Richman & Greer, Gary D. Fox, Larry S. Stewart, Miami, Fla., for the Glen and Barbara Dorsey.

Anthony M. Lanzone & Associates, Anthony M. Lanzone, Robert A. Calinoff, New York City, for Honda Motor Co., Ltd. and American Honda Motor Co.

DeWolf, Ward, Morris, Wohlust, Jontz & O'Donnell, John L. O'Donnell, Jr., Thomas B. DeWolf, Orlando, Fla., for Honda Motor Co., Ltd.

Akerman, Senterfitt & Eidson, John Edwin Fisher, Orlando, Fla., for Continental Cas. Co.

*Former Fifth Circuit case, Section 9(3) of Public Law 96-452 — October 14, 1980.

Joe N. Unger, Miami, Fla., for Honda Motor Co., Ltd., American Honda Motor and Mission Ins.

Appeals from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, MORGAN and HENDERSON, Circuit Judges.

BY THE COURT:

The motion of the Dorseys that we qualify our mandate to provide for interest from the date of the original judgment, 5 Cir., 655 F.2d 650, with respect to both compensatory and punitive damages is GRANTED.

The liability of Continental to Honda for the punitive damages award is an issue for the district court on remand. If Continental is held liable to Honda, the district court should also decide whether Continental's liability includes the award of interest.

Honda's motion for taxation of costs against Continental is GRANTED.

The motion of the Dorseys to strike the petition for rehearing en banc filed by Honda is DENIED.

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc filed by Honda is DENIED.

The motion of Honda for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 76-388-Orl-Civ-R

GLEN K. DORSEY, JR. and BARBARA J. DORSEY, his wife,
Plaintiffs,

v.

HONDA MOTOR COMPANY, LTD., *et al.*,
Defendants.

FILED
ORLANDO, FLA.
NOV 2 1979
WESLEY R. THIES
CLERK

MEMORANDUM OF DECISION

On 25 October 1979, the court heard oral argument on the following:

1. Defendants' *Motion To Set Aside Verdict And Enter Judgment In Accordance With Defendants' Motions For Directed Verdict*, and *Alternative Motions For Remittitur* and *For New Trial*, filed 6 July 1979.

2. Defendants' *Motion To Alter Or Amend Judgment*, filed 6 July 1979.

3. Plaintiffs' *Motion For Entry Of Judgment Against Party Defendants*, filed 6 September 1979.

4. Defendant Continental Casualty Company's *Motion To Limit Liability*, filed 19 October 1979.

5. Defendant Continental Casualty Company's *Motion To Dismiss And Vacate Judgment And Alternative Motion For Rehearing*, filed 25 October 1979.

With regard to the Defendants' motion to set aside the verdict and enter judgment in accordance with their motions for directed verdict, the evidence considered most favorably for the Plaintiffs indicates the following. In the mid-1960's, the Defendant Honda Motor Company, Ltd. (hereafter referred to as "Honda") developed, a small, lightweight automobile which it ultimately manufactured and exported to the United States and Europe to meet the demand in those countries for a low-priced automobile economical to operate. The vehicle which was sold in the United States was called a Honda AN600. It weighed approximately 1356 pounds. Its counterpart exported for sale to the European market was designated as a Honda N600 and weighed approximately 1216 pounds.

The testing of the prototype vehicles was conducted in Japan by employees of Honda R&D Ltd., a wholly owned subsidiary of the Defendant Honda. The testing of the prototypes revealed that a dummy properly restrained by seat and shoulder belts would hit the interior front parts of the passenger compartment when the vehicle was involved in a head-on collision with a standard size American vehicle under conditions sufficient to generate the impact of a thirty mile an hour barrier crash. Despite this knowledge and a recommendation by an employee of Honda R&D Ltd. to enlarge the vehicle (PX 31), the Defendant Honda in 1970 began to export the AN600 for sale in the United States without increasing the vehicle's size or body strength or warning purchasers of its crash characteristics.

As mentioned above, the AN600 weighed approximately 1356 pounds. By way of comparison, a full size American vehicle such as that with which Mr. Dorsey collided weighs about 3600 pounds. On the AN600 the distance from the left "A" pillar to the driver's head was about thirteen inches. On a standard size American vehicle the comparable distance is about twenty inches.

The Plaintiff, Mr. Dorsey, bought a new Honda AN600 early in 1972. He chose the vehicle because he desired an automobile which offered economy in operation. He testified that the vehicle was comfortable and provided him adequate head room. The vehicle came equipped with a lap and shoulder belt and a steering wheel designed to give way to the left in the event of a front-end collision.

Mr. Dorsey testifed he was unaware of the crash characteristics of the car, but realized the vehicle could sustain severe damage in the event of a collision with a standard size American automobile.

On 9 March 1972, while Mr. Dorsey was driving his AN600 in a northerly direction through an intersection at approximately thirty miles an hour, the vehicle was struck by a standard size Ford which approached from Mr. Dorsey's left. As a result of the impact, the seat in Mr. Dorsey's vehicle moved forward and to the left and the "A" pillar on the left side was deformed rearward approximately thirteen inches. Mr. Dorsey, although wearing his seat and shoulder belt, struck some part of the interior of the passenger compartment and received serious permanent injury.

A post-accident examination of the AN600 by one of the Plaintiffs' expert witnesses, Mr. James McElhaney, led him to conclude that the Plaintiffs' vehicle met all applicable standards promulgated by the United States Department of Transportation.

It is the opinion of the court that under the law of the case, a jury acting reasonably could have disagreed as to whether or not the Defendants Honda and American Honda Motor Company, Inc. were liable for compensatory damages. However, it is the conclusion of the undersigned that a jury acting reasonably could not have found liability for punitive damages. *Wansor* v. *George Hantscho Co. Inc.*, CA5, 1978, 570 F.2d 1202. The court will, therefore, grant the motion for a directed verdict on the punitive damage claim.

Crash characteristics as a basis for tort liability have only recently been recognized in the law of Florida. See *Ford Motor Company* v. *Evancho*, Fla. 1976, 327 So.2d 201. No Florida cases allowing punitive damages arising from a failure to adopt a particular automotive design or warn of its crash characteristics have been cited to the court. The general principles of Florida law on punitive damages, however, are clear. Punitive damages are not intended to compensate an injured person. Rather, the award of punitive damages is to punish a defendant and deter others. See *Winn & Lovett Grocery Co.* v. *Archer*, Fla. 1936, 171 So. 214, 221. As a consequence, punitive

damages are awarded in a very limited range of civil cases. In the *Winn & Lovett* case, supra, the court at page 221 said:

> ". . . Exemplary damages are given solely as a punishment where torts are committed with fraud, actual malice, or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. Exemplary or punitive damages are therefore damages ultra compensation, and are authorized to be inflicted when the wrong done partakes of a criminal character, though not punishable as an offense against the state, or consists of aggravated misconduct or a lawless act resulting in injury to plaintiff when sought to be redressed by a civil action for the tort. . . ."

See also *Auto Specialists Mfg. Company* v. *Boutwell*, Fla. App. 1976, 335 So.2d 291, where the trial court was held to have correctly directed a verdict on the plaintiff's claim for punitive damages where the manufacturer of a hydraulic jack was apparently shown to have been aware of the explosive characteristics of the jack.

In the present case, it was basically the diminutive size of the Defendants' product and the difference between its size and that of standard American vehicles which rendered the Defendants' vehicle unsafe in the event of a collision. See the testimony of James McElhaney, Plaintiffs' expert. This source of potential harm, however, was obvious on casual observation. Mr. Dorsey recognized when he bought the automobile that it could sustain serious damage in the event of a collision with a larger automobile. Finally, the evidence in the present case indicates as mentioned above that the Defendants' vehicle was manufactured in accordance with all applicable United States Government standards. Under these circumstances, the conduct of the Defendant Honda cannot be said to fall within the ambit of those activities which under Florida law justify an award of punitive damages.

With respect to the Defendants' alternative motions for remittitur and new trial, suffice it to say that the court has considered the same and found them to be without merit. The primary authorities relied on by the court in the preparation of its jury charges on the liability aspect of the care are the following: *Smith* v. *Fiat-Roosevelt Motors, Inc.*,

CA5, 1977, 556 F.2d 728; *Tampa Drug Co.* v. *Wait*, Fla. 1958, 103 So.2d 603; *McCullough* v. *Beech Aircraft Corp.*, CA5, 1979, 587 F.2d 754; *West* v. *Caterpillar Tractor Co., Inc.*, Fla. 1976, 336 So.2d 80; *Ford Motor Co.* v. *Evancho*, Fla. 1976, 327 So.2d 201, and *Nicolodi* v. *Harley-Davidson Motor Co., Inc.*, Fla. App. 1979, ___ So.2d ___.

With respect to the Defendants' motion to alter or amend the judgment, Defendants have correctly pointed out that the court erred in entering a judgment against American Honda Motor Company, Inc. for punitive damages. This was inconsistent with the jury verdict and is subject to correction under Rule 60, Federal Rules of Civil Procedure. On the other aspect of the motion to alter or amend the judgment, the Plaintiffs and Defendants have stipulated that the Defendants will be entitled to a $9,000.00 credit against the judgment in favor of Mr. Dorsey and a $1,000.00 credit against the judgment in favor of Mrs. Dorsey by reason of $10,000.00 paid the Plaintiffs on behalf of a third party.

The Plaintiffs on 6 September 1979 filed their motion for entry of judgment against the insurance company defendants who were made parties to the litigation. In response thereto, the Defendant Continental Casualty Company filed on 19 October 1979 a motion to limit liability. At the hearing on these motions, counsel for all parties agreed to attempt to stipulate on the extent to which each insurance company would be liable for the judgment for compensatory damages. In the event the parties are unable to enter into such a stipulation within fifteen days from the date of this Memorandum of Decision, counsel for the Plaintiffs shall so advise the court and the court will set a further hearing at which testimony will be taken to determine the amount of the unexhausted limits of the policies covering the liability of the primary defendants. The court finds, however, no just reason for delay in the entry of judgment against Defendants Honda and American Honda Motor Company, Inc. and will direct the entry of a judgment against those Defendants pursuant to Rule 54(b), Federal Rules of Civil Procedure.

At the hearing on the aforesaid motions, the Defendant Honda argued that the judgment against the insurance company defendants

should include the punitive damages assessed by the jury. While this issue is mooted by the court's ruling on the motion for a directed verdict, because of the possibility of appellate review, economy of judicial labor may be advanced by this court expressing its opinion on the issue.

As announced in *Northwestern National Casualty Company* v. *McNulty*, CA5, 1962, 307 F.2d 432, it is contrary to the public policy of the State of Florida to enforce a liability policy under the law of the State of Florida with respect to punitive damages. While this remains the public policy of Florida, intermediate appellate courts of Florida have not applied the policy to situations where the purpose for the policy would not be served. These are situations in which the insured was guilty of no active negligence, but simply was liable by reason of ownership or the misconduct of a low level employee. See *Travelers Insurance Company* v. *Wilson*, Fla. App. 1972, 261 So.2d 545, and *Hartford Accident & Indemnity Company* v. *U.S. Concrete Pipe*, Fla. App. 1979, 369 So.2d 451, and authorities therein cited.

Independent counsel for Honda made an appearance after the verdict. He argued at the hearing on the post-trial motions that the jury should have been asked to resolve the punitive damage coverage question. This argument is without merit because it misconceives the very nature of the case. In the present case, Honda's liability arose out of the adoption of a particular automotive design and the sale of its product manufactured under same. This conduct could not be deemed passive under any view of the evidence or the exception to the *McNulty* policy developed by Florida appellate courts. On the present record, the reasons for the *McNulty* policy clearly apply and any liability for punitive damages arising out of the present case may not be imposed on the insurance company defendants.

Next independent counsel for Defendant Honda argues that the insurance company defendants waived the right to limit liability by not pleading the lack of punitive damage coverage. This argument is without merit. The coverage issue was raised by the Plaintiffs' pleading which affirmatively alleged a claim for punitive damage and the insurance contracts as a basis for the insurance company defendants' liability and joinder in the action. Given these allegations,

there was no need for the insurance companies to plead a conclusion of law by way of a defense.

Finally, independent counsel for Honda argues that a conflict of interest arose by reason of the fact that the insurance companies (with the exception of Continental Casualty Company) continued to defend the action after the claim for punitive damages was injected into the litigation by the amendment to the Third Amended Complaint. If there is any factual and legal merit to this contention, Honda's remedy would be by a separate action for damages since coverage for punitive damages cannot be created by estoppel or waiver or even an express contractual intent. See *Northwestern National Casualty Company* v. *McNulty*, supra, where the court at page 442 states:

> ". . . Consistency compels us to hold, however, that since public policy forbids an insurer and an insured to enter into an insurance contract covering punitive damages, public policy forbids the accomplishment of the result by an estoppel. . . ."

This court concludes for the reasons stated above that any judgment against the insurance company defendants must be limited to compensatory damages plus interest and costs.

Finally, at the motion hearing on 25 October 1979, one of the attorneys for Defendant Continental Casualty Company filed a motion to dismiss and vacate judgment and alternative motion for rehearing. The theory of this motion is that the court lacked in personam jurisdiction over Honda Motor Company, Ltd. under Florida's long-arm statute, Fla. Stat. 48.182. This issue has previously been ruled on and no showing was made to justify reconsideration of the court's previous ruling (see orders entered herein on 6 December 1976 and 4 February 1977). Hence said motion will be denied.

DONE AND ORDERED in Chambers at Orlando, Florida, this 2nd day of November, 1979.

/s/ JOHN A. REED, JR.
John A. Reed, Jr.
JUDGE

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MERCURY MOTORS EXPRESS, INC.,

Petitioner,

v.

PATRICIA LYNN SMITH, as Personal Representative of the Estate of David Jefferson Faircloth, Jr., deceased, and for the benefit of David Jefferson Faircloth, III, a minor, son of David Jefferson Faircloth, Jr., deceased,

Respondent.

No. 57368.

Supreme Court Of Florida

Jan. 22, 1981.

Sheridan K. Weinstein of Papy, Poole, Weissenborn & Papy, Coral Gables, for petitioner.

Headley & Headley, Miami, and Mark Hicks of Daniels & Hicks, Miami, for respondent.

Larry Klein, West Palm Beach, for The Academy of Florida Trial Lawyers, amicus curiae.

ALDERMAN, Justice.

We accept jurisdiction of this case because the decision of the district court, reported at 372 So.2d 116 (Fla. 3d DCA 1979), conflicts with *Alexander* v. *Alterman Transport Lines, Inc.*, 350 So.2d 1128 (Fla. 1st DCA 1977).

Richard Welch, an employee of the petitioner, Mercury Motors Express, while driving a tractor-trailer for his employer, lost control of the vehicle, drove off the road, and hit David J. Faircloth, Jr., causing his death. Respondent, the personal representative of the decedent's estate and the plaintiff in the trial court, alleged that Welch, "while acting in the scope of his employment with the Defendant, MERCURY MOTORS EXPRESS, INC.," was "driving and operating the said vehicle while under the influence of alcohol to the extent that his ability to drive was impaired and did so in a reckless

and negligent manner and at an excessive rate of speed, with a willfull and wanton disregard for the life and safety of others. . . ." Mercury Motors does not dispute these factual allegations, and for the purpose of our review, we accept them as true. When the case was tried, the jury awarded the plaintiff $400,000 compensatory and $250,000 punitive damages. Mercury Motors paid the compensatory damage award and appealed only the punitive damage judgment. In a brief opinion, the district court said that the legal issue presented "is whether a corporate employer and Interstate Commerce Commission permit holder can be liable in punitive damages for the willful and wanton misconduct of its employee while acting within the scope of his employment and operating a tractor and trailer leased by the corporate employer and operated under its permit." *Mercury Motors Express, Inc.* v. *Smith*, 372 So.2d at 116. The district court, concluding that "a jury may assess punitive damages against a corporate employer when its employee, acting within the scope of his employment, has been guilty of willful and wanton misconduct, such as in this case," affirmed the award of punitive damages. 372 So.2d at 117. We quash the decision of the district court and hold that, in the absence of some fault on the part of the corporate employer, it is not punitively liable for the willful and wanton misconduct of its employees.

[1] We begin our analysis of this case by affirming the long-established Florida rule that "the liability of a corporate master for punitive or exemplary damages for wanton or malicious torts committed by an agent or servant is no different from the liability of an individual master under the same circumstances." *Winn & Lovett Grocery Co.* v. *Archer*, 126 Fla. 308, 171 So. 214, 221 (1936). The fact that the employer in this case is a corporation rather than a natural person is not legally significant.

[2, 3] The determinative issue is under what circumstances may an employer under the doctrine of respondeat superior be held vicariously liable for punitive damages as the result of the willful and wanton misconduct of his employees committed while acting in the scope of their employment. Relevant to this issue is the distinction between compensatory and punitive damages. The objective of compensatory damages is to make the injured party whole to the

extent that it is possible to measure his injury in terms of money. The plaintiff received $400,000 for compensatory damages, and the sufficiency of that award is not questioned. Punitive damages, on the other hand, go beyond the actual damages suffered by an injured party and are imposed as a punishment of the defendant and as a deterrent to others. *Fisher* v. *City of Miami*, 172 So.2d 455 (Fla. 1965).

Plaintiff effectually argues that under the doctrine of respondeat superior, an employer without fault on his part will always be vicariously liable for punitive damages for the willful and wanton misconduct committed by his employees within the scope of their employment. We reject this argument.

In *Alexander* v. *Alterman*, the First District Court, in a similar factual situation, held that the plaintiff's complaint was sufficient to allege liability on the part of the employer for compensatory damages caused by the negligent acts of its truck driver employee, but appropriately asked: "[W]hat wrong did Alterman commit that demanded that it be punished?" Answering that question, the district court said:

> According to the third amended complaint, Alterman's gross negligence was solely the act of operating a trucking business. Not a single allegation is found as to Alterman's negligently failing to investigate or to otherwise verify Penley's ability to operate its truck in a law abiding manner; there is not a single allegation that Alterman knew or should have known Penley's propensity to consume alcoholic beverages; there is not a single allegation that Alterman knew or should have known that Penley would operate its truck in a "grossly negligent manner and with outrageous, willful, wanton and utter disregard for other vehicles and users." . . .
>
> [T]he third amended complaint before use contains no allegation from which a jury could lawfully infer that the corporate defendant was negligent by employing or retaining in its employment the defendant, Penley, or that he possessed dangerous propensities known or which should have been known to his employer.

350 So.2d at 1130. The First District Court correctly held that in the absence of fault, an employer is not vicariously liable for punitive damages as the result of the actions of its employees within the scope of their employment.

After the district court's decision in *Alexander* v. *Alterman Transport Lines, Inc.*, 350 So.2d 1128 (Fla. 1st DCA 1977), the plaintiff in that case was allowed to amend his complaint as to punitive damage, and, when the case was tried, he was awarded punitive damage against the employer. The case was again appealed to the First District Court of Appeal which affirmed the punitive damage award. *Alexander* v. *Alterman Transport Lines, Inc.*, 387 So.2d 422 (Fla. 1st DCA 1980). The amended complaint on which the case was tried alleged that Alterman Transport Lines knew or, in the exercise of reasonable care, should have known that immediately prior to embarking on his work assignment, its employee was in no condition to drive and operate his truck since he was under the influence of alcohol or some other drug or narcotic to the extent that his normal faculties were impaired, making it unsafe for him to drive. The issue of Alterman's knowledge of its employee's condition was presented to the jury by the court's instructions. In the most recent *Alexander* decision, it is clear that the plaintiff alleged and the jury found fault on the part of the employer.

Alterman sought reversal of the punitive damage award by contending that even if its employee was intoxicated when he appeared at the terminal on the morning of the accident and even if it either knew or, in the exercise of reasonable care, should have known of his condition when he took charge of the truck, such conduct on its part was not sufficiently willful, wanton, or outrageous to justify an award of punitive damages. The district court correctly rejected this contention and held that willful, wanton, or outrageous conduct on the part of the employer, independent of the willful, wanton, or outrageous conduct of its employee-driver, is not a prerequisite to the vicarious punitive damage liability of the employer. In its earlier decision, the First District properly rejected the possibility of Alterman's vicarious liability for punitive damages under the doctrine of respondeat superior, where the plaintiff alleged the willful, wanton, or outrageous conduct of the employee within the scope of his employment but failed to allege any fault on the part of the employer. A different result was justified in the subsequent case because the plaintiff alleged and proved not only willful, wanton, or outrageous conduct on the part of the employee but also negligence on the part of the employer which contributed to the plaintiff's injury. Under those circumstances, the

employer was properly held vicariously liable for punitive damages based upon the willful, wanton, or outrageous conduct of its employee.

An analogous situation involving the dangerous instrumentality doctrine was presented to the Second District Court in *Waldron* v. *Kirkland*, 281 So.2d 70 (Fla. 2d DCA 1973). In that case, the plaintiff sought punitive damages against the owner of the motor vehicle based upon the flagrant and reckless misconduct of the driver. The determinative issue was whether the owner, who was without fault, was vicariously liable for punitive damages. The district court affirmed the trial court's partial summary judgment denying the plaintiff's claim for punitive damages. The court said that the owner did not know his stepson, the driver, was drinking on the date of the accident or had ever consumed alcoholic beverages and concluded that had the owner known of his stepson's propensity to drink, he would not have consented to his use of the motor vehicle. Acknowledging that the owner would be vicariously liable for *compensatory* damages, the court held that public policy is not served by also imposing liability for punitive damages when the owner is without fault. In other words, the court held that under the dangerous instrumentality doctrine, an owner is not vicariously liable for punitive damages just because he owned the motor vehicle.

As noted by the district court in *Alexander* v. *Alterman Transport Lines, Inc.*, 350 So.2d at 1130, the issue presented in the present case was not considered or passed on by this Court in *Bould* v. *Touchette*, 349 So.2d 1181 (Fla. 1977). In *Bould*, the plaintiff was awarded punitive damages against United States Concrete Pipe Company, the employer of Mitchell Touchette, who, in the course and scope of his employment, negligently caused the accident which was the subject of that suit. The only issue concerning punitive damages was Concrete Pipe's contention that the award was excessive. The vicarious liability of the employer, Concrete Pipe, for punitive damages in the absence of fault on its part was not an issue in the case and was not considered by this Court.

[4-6] We conclude that the principles of law which should be applied in this and in other similar respondeat superior cases are as

follows: (1) An employer is vicariously liable for *compensatory* damages resulting from the negligent acts of employees committed within the scope of their employment even if the employer is without fault. This is based upon the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even though it means placing vicarious liability on an innocent employer. (2) Punitive damages, however, go beyond the actual damages suffered by an injured party and are imposed only as a punishment of the defendant and as a deterrent to others. (3) Before an employer may be held vicariously liable for punitive damages under the doctrine of respondeat superior, there must be some fault on his part. (4) Although the misconduct of the employee, upon which the vicarious liability of the employer for punitive damages is based, must be willful and wanton, it is not necessary that the fault of the employer, independent of his employee's conduct, also be willful and wanton. It is sufficient that the plaintiff allege and prove some fault on the part of the employer which foreseeably contributed to the plaintiff's injury to make him vicariously liable for punitive damages.

[7] Applying these principles, we hold that there is no basis for the punitive damage award against the defendant employer. The plaintiff alleges no fault on the part of the employer and relies entirely upon the master-servant relationship to make the employer vicariously liable for punitive damages. The district court should have reversed the punitive damage judgment.

In view of our determination that the punitive damage award must be reversed, we need not consider petitioner's second point. The decision of the district court is quashed, and this cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

BOYD, OVERTON, ENGLAND and McDONALD, JJ., concur.

OVERTON, J., concurs with an opinion, with which McDONALD, J., concurs.

SUNDBERG, C.J., and ADKINS, J., dissent.

OVERTON, Justice, concurring.

The public should clearly understand that there is no differnce between the owner of a single motor vehicle and the operator of a truck line. If either one knowingly allows an intoxicated driver to drive his vehicle, he may be liable for punitive damages as well as compensatory damages.

McDONALD, J., concurs.

Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15 U.S.C.

§ 1381. Congressional declaration of purpose

Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to expand the national driver register.

Pub.L. 89-563, § 1, Sept. 9, 1966, 80 Stat. 718.

15 U.S.C.

§ 1391. Definitions

As used in this subchapter —

(1) "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.

(2) "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment

performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

* * * * *

15 U.S.C. § 1392

* * * * *

(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

* * * * *

(f) In prescribing standards under this section, the Secretary shall —

(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

* * * * *

15 U.S.C. § 1397

* * * * *

(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

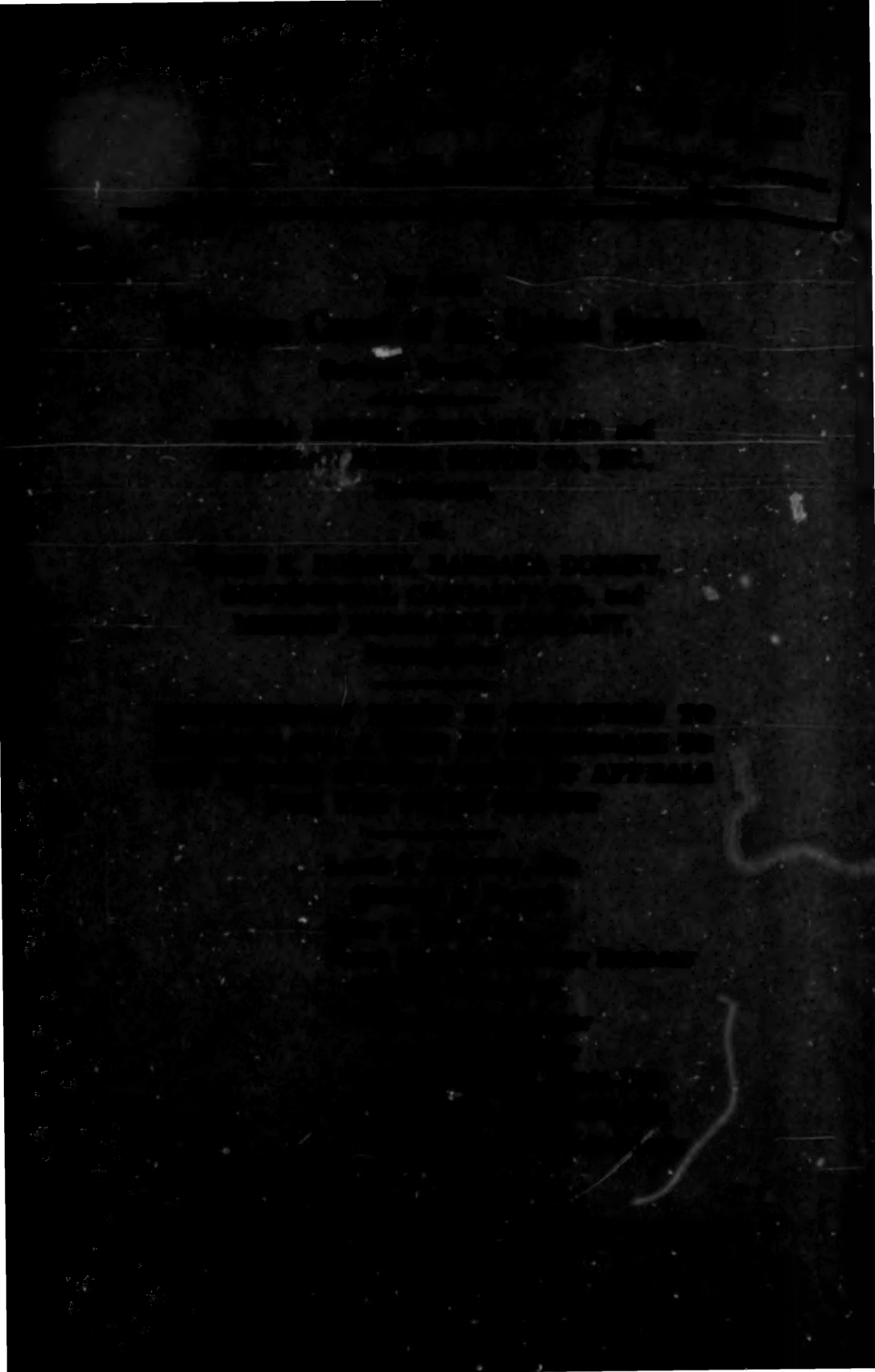
Pub.L. 89-563, Title I, § 108, Sept. 9, 1966, 80 Stat. 722.

* * * * *

28 U.S.C.

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.



QUESTIONS PRESENTED

Respondents, GLEN K. DORSEY and BARBARA DORSEY (hereinafter "Respondents"), are not satisfied with what petitioners, HONDA MOTOR COMPANY, LTD. and AMERICAN HONDA MOTOR CO., INC. (hereinafter "Petitioners" or "Honda"), claim to be the questions presented. As phrased by petitioners, the questions contain material misstatements concerning the proceedings below and the rulings of the Court of Appeals. The fact that petitioners had to go to such lengths underscores the true lack of any jurisdictional basis for this Petition. Respondents submit that when accurately stated, the questions are:

1. Where, while an appeal was pending, the state court of last resort issued an opinion dealing with the recoverability of punitive damages, the Court of Appeals expressly requested the decision be addressed, and the Court of Appeals thereafter ruled on the applicability of that decision, did the Court of Appeals violate 28 U.S.C. §1652, the Rules of Decision Statute?

2. Where plaintiff established both fault and reckless conduct on the part of Honda, was it a denial of due process to impose punitive damages on Honda?

3. When the Court of Appeals modified its opinion on rehearing after new issues had been briefed, does it depart from the accepted and usual course of judicial proceedings so as to call for this Court to exercise its supervisory power?

4. May punitive damages be imposed against an automobile manufacturer who acts in reckless disregard for the safety of users of its vehicles, notwithstanding that it complied with federal regulations that were not applicable to the claimed vehicle defect?

5. Should Rule 49 damages be awarded in this case because of the frivolous and scandalous nature of the petition?

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No. 81-2252

IN THE

Supreme Court of the United States

October Term, 1981

HONDA MOTOR COMPANY, LTD. and
AMERICAN HONDA MOTOR CO., INC.,
Petitioners,

vs.

GLEN K. DORSEY, BARBARA DORSEY,
CONTINENTAL CASUALTY CO., and
MISSION INSURANCE COMPANY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Honda Motor Company, Ltd. and American Honda Motor Co., Inc., seek a petition for certiorari in a last ditch effort to escape the consequences of marketing their product in reckless disregard of known safety defects. It is respondents' position that the petition is without merit and should be denied. Respondents further state that not only is the petition without merit, but it is also frivolous within the meaning of Rule 49(2) and, as a result, damages should be assessed against petitioners.

The reasons and arguments in support of respondents' position follow.

STATEMENT OF THE CASE

In their Statement of the Case, petitioners twist and distort the proceedings and evidence below. Respondents do not accept petitioners' statement and submit that when accurately presented, the statement is as follows:

Glen Dorsey was involved in an automobile collision of only moderate impact—well below the universally accepted safety design criteria of both the automotive industry and Honda. In a properly designed car, the passenger compartment would not have failed and Glen Dorsey would have sustained no serious injuries. Yet he was left a cripple for life.

By reason of its own internal testing, Honda had actual knowledge as early as 1967 that the AN 600—the model involved in this case[1]—was defective. From 1967 on, the testing showed a constant pattern of defective and unsafe design. Yet Honda did nothing to correct the defects pointed out by its engineers nor did it warn consumers of the dangers inherent in the operation of the vehicle. And, when it exported the car to this country and offered it for sale, Honda represented it as being a safe vehicle.

Honda continued its safety claims in this litigation. It claimed that the occupant protection of the AN 600 was equivalent to American cars. This was achieved, according to the Honda engineers, by fortifying the passenger compartment with "bones". Bones were described as additional members added to reinforce and increase strength. To test the truth of this claim, an identical AN 600 was dissected. Not a single bone was present! Indeed, by

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1. The AN 600 was sold in the United States by Honda for only two years. The Dorsey vehicle was a 1971 model that was purchased in 1972 but was actually manufactured on June 11, 1971. After 1972, Honda discontinued production of the AN 600.

the post trial motions, Honda's counsel conceded that there was no such reinforcement.

Throughout discovery and trial, Honda accepted full responsibility for the design of the AN 600. That was admitted in Honda's answer and reiterated in discovery and the pretrial stipulation. In discovery, Honda produced both documents and witnesses from its wholly-owned design subsidiary, Honda R&D, in response to discovery requests directed to Honda. Even at trial, Honda produced Honda R&D employees to testify on its behalf. Indeed, at trial Honda had *no objection* when Plaintiff offered into evidence the Honda R&D test reports that it had previously produced. Honda preserved no point for appellate review in this regard.

The vehicle tests introduced into evidence revealed that the AN 600 failed to meet Honda's own internal standards which were identical to and obviously developed in anticipation of the federal regulations governing occupant protection which Honda knew were going to become effective some six months after the Dorsey vehicle was manufactured. Despite the fact that Honda was aware that this standard was going into effect and despite its knowledge that the vehicle failed to meet the standard, Honda argues that because it complied with other standards unrelated to the defect at issue, its compliance should somehow operate to insulate it from the recklessness found by the jury. That contention is so lacking in merit that it was never even raised in the district court. At trial, Honda did not articulate any such ground in its motion for directed verdict, requested no jury instruction on the point and conceded at the charge conference that compliance did not mean that it did not do anything wrong. It was not until the appeal that Honda advanced its so-called compliance argument.

Following trial, a new issue surfaced in the case. This issue is central to understanding the action of the Court of Appeals in deleting a portion of its original opinion. The issue is whether Honda's insurers are liable to pay the punitive portion of the jury's verdict.

In Florida, one cannot insure against liability for punitive damages based upon one's own conduct. However, if one is held punitively liable solely on a vicarious basis, then insurance may cover the punitive verdict. It was in this context that, following the jury's verdict, Honda raised the claim that it was being held vicariously liable for punitive damages. The district judge ruled that the insurance did not cover the punitive award and that ruling was the basis of a cross-appeal by Honda.

At no time throughout the entire course of discovery and trial did Honda ever raise the arguments that are advanced here—i.e., that it should not be held liable for punitive damages due to the allegedly vicarious relationship with its subsidiary or that the trial below resulted in a denial of due process.

While the appeal was pending below, the Florida Supreme Court decided *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. 1981), which adopted one line of Florida cases[2] which held that before a principal could be held vicariously liable for punitive damages based upon the acts of its employee, the principal must be guilty of "some fault." Notwithstanding the earlier Florida case law, in the Court of Appeals, Honda did not initially raise the *Mercury Motors* argument that it now relies on here.

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2. The *Mercury Motors* decision did not represent a new rule of Florida law. In *Mercury Motors*, the Florida Supreme Court adopted the rationale of *Alexander v. Alterman*, 350 So. 2d 1128 (Fla. 1st DCA 1977). The *Alexander* case was decided nearly two years before the jury trial in this case.

In its main brief, Honda still referred to "the *Honda* testing and design program" and "the testing program carried on by *Honda*" (emphasis supplied). Even after *Mercury Motors* was decided, Honda did not seek to rely upon it or bring it to the Court's attention. It was not until Honda's petition for rehearing, filed nine months after the *Mercury Motors* decision, that Honda raised this contention for the first time.

In the decision which Petitioners seek to have reviewed, the Court of Appeals reversed the district court's judgment n.o.v. on punitive damages. In so doing, the Court noted:

> The evidence permitted the jury to find that defendant knew that it was creating unreasonable risks not necessarily incident to the unique design desired by the purchaser and received recommendations for eliminating or minimizing these unreasonable risks but did not accept them. 655 F.2d at 657.

Significantly, one month before the Court of Appeals rendered its decision, one of the Florida courts of appeals handed down a decision of first impression on punitive damages in product liability actions. *American Motors Corp. v. Ellis*, 403 So. 2d 459 (Fla. 5th DCA 1981), *cert. denied*, ... So. 2d ..... Although the Court of Appeals had already reached its own conclusion which was in accord, it noted the *American Motors* decision in a footnote. 655 F.2d at 658.

The Court of Appeals also disposed of the insurance coverage issue. It remanded that issue to the district court for determination as to whether Honda's culpability was based on its own conduct or whether it was simply being held vicariously liable for the acts of its wholly-owned subsidiary. On that issue, the Court noted:

> Neither Continental nor the district court points us to substantial evidence that any responsible person of Honda was reckless or even that any such person had knowledge of the results of the tests conducted by Honda R&D or of the recommendations of Honda R&D employees that the design of the AN 600 be changed. The liability of Honda is, therefore, not based upon its own acts but upon those of Honda R&D and its employees, for which Honda in the pre-trial order accepted responsibility. 655 F.2d at 660.

Following the decision of the Court of Appeals, in its petition for rehearing based largely on the above language, Honda for the first time raised the contention that it was not actively at fault, was being held purely vicariously liable and, therefore, it could not be subject to punitive damages. The Court of Appeals directed that respondents address that argument.

In their response respondents identified specific items of record evidence demonstrating reckless conduct on Honda's own part. Included in that evidence were vehicle tests that revealed the defective nature of the passenger compartment AN 600. These tests were conducted by Honda itself, as opposed to Honda R&D. Also included were Honda technical engineering papers.

In light of this evidence, the Court of Appeals deleted that portion of its original opinion on the insurance issue which stated Honda's liability was not based upon its own acts. The Court of Appeals did not ignore or fail to follow controlling state law. The Court of Appeals did not change the burden of proof nor act to deny Honda due process.

SUMMARY OF ARGUMENT

This is a products liability, diversity action decided under a unique set of facts and the substantive law of the State of Florida. It presents no federal or constitutional issues of any significance whatsoever. This case meets none of the Rule 17 criteria and petitioners have failed to raise even a colorable basis or justification for this Honorable Court to exercise discretionary jurisdiction.

Petitioners advance four grounds upon which they contend this Court should take jurisdiction.

The principal argument advanced here, to the effect that Honda is being improperly held vicariously liable for the acts of its subsidiary, was not preserved in the district court. Indeed, Honda stipulated any such issue away by agreeing that it was responsible for the acts of its subsidiary. Furthermore, under the controlling state law standard, there was more than sufficient evidence to support the imposition of punitive damages on Honda—both for its own acts and the acts of its subsidiary. Far from ignoring controlling state law, as contended by petitioners, the Court of Appeals expressly recognized that law and determined that, under the facts of this case, it did not absolve Honda from punitive damages.

As to petitioners' second point, the Court of Appeals in no way acted improperly or denied Honda due process. To the contrary, the Court of Appeals acted in an entirely appropriate and logical manner, in full accord with controlling law.

Thirdly, petitioners launch a vitriolic, personal attack on the Court below because it amended its opinion following *petitioners'* petition for rehearing. This contention is frivolous. The Court, on rehearing, merely deleted a por-

tion of its original opinion after the parties had briefed certain issues which had not been raised during the main appeal.

The safety standards, with which petitioners claim compliance, do not address the defect involved in this case. Petitioners failed to comply with their own standards that did cover the defect here. In either event, petitioners' argument flies directly in face of the statute which mandates that compliance with the regulations "does not exempt any person from any liability under common law." This so-called compliance argument was also never raised in the district court.

When petitioners' arguments are thus exposed there is no legal substance. The petition amounts to nothing more than a vicious, scandalous attack on the Court of Appeals. It is frivolous and without merit and damages should be awarded.

THE WRIT SHOULD NOT BE GRANTED

Petitioners, by sophistry and verbal gymnastics, have twisted the decision below in an effort to find some conceivable reason why this Court should accept jurisdiction. Respondents respectfully submit that none of the reasons cited even remotely approach a proper case for certiorari. Because of what respondents perceive as a totally unmeritorious petition, respondents seek Rule 49(2) damages. This will be addressed more fully at the conclusion of this brief.

1. There Is No Conflict Between the Decision Below and the Decisions of This Court.

Respondents do not take exception to the requirement that federal appellate courts must apply controlling

state law as it exists at the time of appeal. But the decision below does not conflict, either directly or indirectly, with that principle. In fact, the Court of Appeals followed and applied not just one, but two very recent controlling state law decisions, both of which were rendered while the case was pending in the appellate court.

Respondents do take exception, however, to the manner in which petitioners have presented this argument. Petitioners contend that because the Court of Appeals deleted a portion of its opinion dealing with the issue of insurance coverage that it automatically follows that the Court failed to apply the *Mercury Motors* decision.

Petitioners blithely ignore the fact that the Court of Appeals expressly considered *Mercury Motors*. Petitioners also ignore the fact, as pointed out by the Court of Appeals, that in the district court the petitioners waived their opportunity to raise the *Mercury Motors* argument, stipulated to acceptance of responsibility for the acts of its subsidiary, made no objection to Honda R&D evidence and at least contributed to "blurring" any distinction between Honda and Honda R&D.[3]

Mercury Motors requires that there be "some fault" on the part of a principal before it can be held vicariously liable for punitive damages due to the actions of its agent.

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3. Parties are not allowed on appeal to undo the consequences of strategic and tactical decisions made at trial. *See, e.g., Jenkins v. General Motors Corp.*, 446 F.2d 377 (5th Cir. 1971) (manufacturer's tactical decision not to object to plaintiff's evidence on mental anguish and pain and suffering constituted waiver which could not be considered on appeal; *Wisconsin Barge Line, Inc. v. Coastal Marine Transport, Inc.*, 414 F.2d 872 (5th Cir. 1969) (failure to raise breach of warranty in answer, pretrial order, or at trial precluded its consideration by Court of Appeals); *United States v. Sinor*, 238 F.2d 271 (5th Cir. 1956) (appellee unsuccessful in attempt to avoid binding effect of a strategic decision made at trial, and a pretrial stipulation entered into as part of that strategy).

In the pretrial stipulation Honda agreed that as manufacturer it had a duty to warn of defects in the automobile at issue. The case was tried, in substantial part, upon Honda's failure to warn. The jury specifically found that Honda was negligent by failing to warn. That finding, by itself, was sufficient to meet the "some fault" test of *Mercury Motors.*

Moreover, even if Honda had not conducted any tests and had no knowledge of the results of the Honda R&D tests, the *Mercury Motors* fault requirement would in any event be satisfied by Honda's failure to conduct its own tests. Under Florida law, failure to make reasonable tests constitutes negligence. *Barfield v. Atlantic Coast Line R.R. Co.*, 197 So. 2d 545 (Fla. 2d DCA 1967). Such negligence would constitute still further evidence of fault on the part of Honda.

Thus, given the record evidence of "some fault" on Honda's part, this case fits squarely wtihin the type of situation when, according to *Mercury Motors*, a principal may be held liable for punitive damages based upon the acts of its agent. Even if Honda had not stipulated to its responsibility for the acts of R&D, under *Mercury Motors* the same result would have followed and the result in state court would have been identical.

Interestingly, petitioners' argument is premised on language which was *deleted* by the Court of Appeals. For all intents and purposes, the language upon which Honda bases its claim of "conflict"—i.e., the part of the opinion which comments on the failure of the district court or the insurance company to point to evidence of willful conduct on Honda's part—no longer exists from a legal or precedential standpoint and cannot, therefore, lead to the "confusion and injustice" conjured up by Honda.

The reason the Court deleted the language cited by Honda is clear. In its petition for rehearing, Honda, for the first time, cited the Fifth Circuit to the *Mercury Motors* case and to the language of the Court's original opinion in which it noted, in connection with the insurance coverage issue, that neither the district court nor Continental (the insurance company) pointed to evidence of willful conduct on Honda's part. The Court requested respondents to describe what evidence of fault was present in the record on the part of Honda, as opposed to its wholly-owned subsidiary, Honda R&D. In reply, respondents pointed out the substantial evidence of misconduct on Honda's own part. Thereafter, the Court, having been advised for the first time of the record evidence of misconduct on Honda's part, deleted from the insurance coverage portion of its opinion the language which would have precluded that issue from being properly retried. At the same time, the Court of Appeals noted that, as to the main case, the issue had been effectively waived by Honda. In so doing, the Court avoided the very "confusion" which Honda contends exists as a result of the language in the main opinion.

In light of the Court of Appeals' modification of its initial decision, Honda's contentions that the appellate court below 1) "neither obeyed nor denied the obligation of *Mercury Motors*" (PC 6)*; 2) "recognized that its decision conflicted with the law of Florida" (PC 7); and "ignore[d] the decisions of the state supreme court" (PC 8) border on the irresponsible and patently fail to establish any basis for this Court's discretionary jurisdiction.

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*PC indicates Petition for Certiorari.

2. The Decision of the Court of Appeals Raises No Due Process Questions and in No Way Shifts the Burden of Proof.

Honda's entire argument under this point is based on its statement that:

> In its original opinion, the Court of Appeals said that the claim that there was faulty conduct on the part of Honda was "not supported by the evidence." 655 F.2d at 660. (PC 9)

What Honda once again remarkably fails to acknowledge is that the very language upon which it relies was *deleted by the Court* on rehearing. The fact that Honda is unable to offer this Honorable Court any better justification for accepting certiorari than some language in the original opinion below, which the Court itself deleted, is perhaps the best indication of the petition's merit.

Having built its foundation upon the deleted language, Honda contends this Court should accept jurisdiction because the deleted language ". . . removes from all future plaintiffs in the district courts of Florida the burden of proving some fault on the part of a principal in order to recover punitive damages." (PC 10.) Such a statement is inaccurate and misleading sophistry. Far from removing plaintiffs' burdens, the Court below explicitly recognized the holding of *Mercury Motors* to the effect that

> . . . before an employer may be held vicariously liable for punitive damages under the doctrine of respondeat superior there must be "some fault" on the employer's part.

670 F.2d at 22. The Court of Appeals, having explicitly recognized the rule of law for which *Mercury Motors* stands, left no doubt as to the law with which "all future plaintiffs in the district court of Florida" must comply in

order to recover punitive damages. It is inconceivable how petitioners could, in good faith, argue to the contrary.

In this case, the jury found that there was negligence, i.e., "fault", on the part of Honda. Additionally, there was substantial evidence of recklessness by Honda. As noted by the Court of Appeals, Honda knowingly ignored the safety deficiencies in its product. 655 F.2d at 656.

Aside from being unable to deny or explain away the record evidence of fault and recklessness on its part, Honda also continues to ignore the fact that it freely admitted its responsibility for the design of the vehicle and further stipulated that "in legal effect the acts of Honda R&D and its employees *were its own acts.*" 670 F.2d at 22. (Emphasis supplied.) Given the record evidence of fault and Honda's own stipulation, the decision below was eminently correct.

The opinion of the Court below obviously raises no due process questions of any sort and in no way affects or alters traditional concepts governing the burden of proof.

3. There Is No Necessity Whatsoever for This Honorable Court to Exercise Its Supervisory Power in This Case.

Petitioners seek to incite this Court to grant certiorari under its supervisory capacity by accusing the Court of Appeals of exercising "raw judicial power" (PC 10) and making a "transparent effort" (PC 11) to avoid state law. There is no way that such rhetoric can be justified in this case.

It is apodictic that a Court of Appeals has the power, authority, and indeed, even the duty, to clarify, modify or completely change its decisions when the occasion war-

rants it. It is for this reason that provisions are made for petitions for rehearing at the appellate level.

There is nothing sinister or "extraordinary" (PC 10) about the Court of Appeals' deletion of language finding no evidence of Honda's fault from that portion of its original opinion directed to the insurance coverage issue. That action was not only natural but obligatory once respondents had specifically identified the evidence. The Court of Appeals logically ruled that Honda could not use *Mercury Motors* as an "escape hatch" where the record abounds with evidence of fault, Honda had accepted responsibility for the acts of its subsidiary and Honda had not preserved that point for appellate review. By the same token, since respondents had in their response to the rehearing petition pointed out the evidence of Honda's fault and recklessness for the first time, the Court could not let stand its original statement in the insurance coverage portion of the opinion to the contrary.

In the present case, the Fifth Circuit did precisely what it should have. Having been apprised of the record evidence of Honda's fault, the Court corrected its earlier opinion to remove any suggestion that the record lacked such evidence. The Court of Appeals in no way departed from the accepted and usual course of judicial proceedings. Petitioners respectfully submit that the Court should be commended, rather than criticized for taking such action.

4. The Court Below Correctly Applied the Federal Statute Which Expressly States That Compliance With Government Standards Does Not Exempt a Manufacturer From Any Liability Under Common Law.

Under this point, Honda once again conceals the most important factor necessary for the Court's consideration.

Honda advises the Court that it had complied with government standards dealing with the seat belt and seat assembly. From there, it argues that a jury finding that a manufacturer acted willfully and wantonly and its awarding of punitive damages against the manufacturer will ". . . [frustrate] the congressional purpose of uniform national regulation."

Petitioners do not, however, disclose that the standards to which they refer were in their embryonic stages and not comprehensive. Most fundamentally, the standards then in effect did not deal with the claimed defect in this case. As the Court of Appeals correctly observed, respondents' case was premised upon a defectively designed passenger compartment which failed to properly protect occupants in the event of a crash. It was the design of the vehicle *as a whole*, not particular components, which formed the basis for respondents' case.

Since there was no comprehensive standard in effect at the time of manufacture of the Dorsey vehicle, the essence of Honda's "compliance" argument becomes a nonstandard argument—so long as the automotive industry can delay implementation of a standard,[4] an automotive manufacturer cannot be subject to punitive damages. Stated another way, what Honda is really contending is that absent violation of a safety standard, a manufacturer cannot be liable for punitive damages. This is not what the statute provides.

The National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §1397(c), specifically provides that compliance with

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4. Prior to January 1, 1972, the minimum standards for motor vehicle safety performance required by 15 U.S.C. §§1391 and 1392 constituted a fledgling regulatory scheme at best. Many delays had been encountered in bringing the standards on line due to the intense resistence of the automotive industry. Ralph Nader, Unsafe At Any Speed (1965).

the federal regulations "does not exempt any person from *any* liability under common law (emphasis added)." The phrase "any liability" means just that—any liability for compensatory or punitive damages. Had Congress intended compliance to negate any liability for punitive damages, it would have been a simple matter to have so stated.

In its petition, on page 12, Honda cites this Honorable Court to the following portion of Senate Report No. 1301:

> [T]he federal minimum safety standards need not be interpreted as restricting state common law standards of care.

Honda fails, however, to cite the Court to the sentence which follows that quoted above:

> Compliance with such standards would thus not necessarily shield any person from product liability at common law.

Honda's position is even more absurd when viewed in light of the fact, which Honda conveniently failed to mention, that in early 1971, the government had finally succeeded in promulgating a comprehensive standard which did deal with the claimed defect in this case. However, the effective date of that standard—MVSS 208—was postponed until January 1, 1972, and it was therefore not applicable to the Dorsey vehicle.

Although not officially applicable to the Dorsey vehicle, Honda had direct knowledge of the MVSS 208 requirements and even purported to use that standard as its own internal standard. In testing the AN 600 Honda learned that it failed to meet this important standard. At trial there was direct evidence of the failure of the AN 600 to meet the requirements of MVSS 208.

Thus, for Honda to contend that it complied with governmental standards—the main one of which was not even in effect at the time—and that such compliance should preclude a finding of willful and wanton conduct is almost laughable. Taken together, respondents respectfully submit that it is clear that, by the legislative history as quoted above and from the clear and unambiguous language of §1397(c), compliance with standards—especially compliance with standards which do not address the defect at issue—was never intended by Congress to shield a manufacturer from liability for punitive damages.

It is, once again, noteworthy that Honda fails to quote any portion of the decision below dealing with the compliance issue. Respondents submit that the following portion of the Fifth Circuit opinion succinctly and accurately analyzes and rejects the identical contentions raised in that Court.

> Moreover, the federal Motor Vehicle Safety Act Standards are unrelated to several of the design deficiencies developed by the plaintiffs' evidence. . . . While the regulations governing seats and seat belts are relevant to portions of the plaintiffs' case, *none of the regulations applicable to Dorsey's car governed the strength of the A pillar or the overall ability of the passenger compartment to protect occupants in a crash.* Furthermore, plaintiffs' expert explained that compliance with the standard governing seat belt stretch would be meaningless in terms of safety if the car was designed to place the driver's head so close to the front of the passenger compartment that it would be vulnerable in a crash. In short, we believe that Florida would not hold as a matter of law that compliance with the applicable regulations, which were far from comprehensive, precluded any finding of recklessness no matter

> how egregious Honda's conduct had been in ignoring tests that indicated design flaws of a different nature.

655 F.2d at 656-7 (emphasis added).

Finally, Honda's argument that the decision below somehow violates 15 U.S.C. §*1392(d)*, precluding states from establishing conflicting safety standards, is without merit. Obviously what the statute contemplates is proscribing state legislatures from enacting fifty different sets of standards which would make compliance by manufacturers difficult. Equally obvious is the fact that §1392(d), in light of the legislative history and §1397(c), in no way was intended to abrogate or affect, in any manner, a manufacturer's liability under state common law.

In summary, all that the Fifth Circuit did on the issue of compliance is to uphold the clear and unambiguous language of §1397(c) which provides that a manufacturer's liability under the common law is unaffected by the enactment of the safety standards.

RULE 49 DAMAGES

Rule 49(2) authorizes this Court to award appropriate damages when a petition for writ of certiorari is frivolous. Respondents respectfully submit that this petition falls within that category.

This petition is not fairly presented. In an effort to secure the granting of the writ, petitioners have launched a vitriolic attack on the Court of Appeals and misstated and omitted material aspects of the proceedings below. The unjustified attack on the Court of Appeals is scandalous and should be disregarded.

This case does not involve even a hint of a constitutional issue. The Court of Appeals has not run roughshod over petitioners. To the contrary, the Court of Appeals acted in a logical, rational manner consistent with controlling state and federal law. The tactics of petitioners should not go unaddressed.

CONCLUSION

The opinion below does not invoke conflicts between appellate courts or conflict with federal statutes or deal in any way with matters of great public importance.

Accordingly, respondents respectfully submit that this Honorable Court should deny Honda's petition for certiorari and award damages to respondents.

Respectfully submitted,

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No. 81-2252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HONDA MOTOR COMPANY, LTD, and
AMERICAN HONDA MOTOR CO., INC.,
Petitioners,

vs.

GLEN K. DORSEY, BARBARA DORSEY,
CONTINENTAL CASUALTY CO., and
MISSION INSURANCE COMPANY,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

In their Brief in Opposition to Certiorari, Respondents Dorseys have substantially misstated portions of the record and attributed statements to the Court of Appeals and to Petitioners which neither made. To correct these misrepresentations, Petitioners file this reply.

A. The Accident

The Dorseys insist that this 45° angle collision between the Honda going 30 m.p.h. [655 F.2d at 653], and the Ford, weighing nearly three times more, was a "moderate impact," and that:

> In a properly designed car, the passenger compartment would not have failed and Glen Dorsey would have sustained no serious injuries. [Br. in Opp., p. 2]

This is contrary to the testimony of the Dorseys own expert witness that if an average American vehicle were hit at a 45° angle by a vehicle weighing three times as much he would expect serious damage and a serious possibility of injury to the driver [T.T. Vol. III, pp. 146-147].

B. Lack Of Evidence Of Honda's Fault

On the same page, the Dorseys refer to Honda's "own internal testing;" "actual knowledge as early as 1967," and defects "pointed out by its engineers." This is all contrary to the facts in the opinion of the Fifth Circuit that the testing was done by Honda R & D, and that the evidence of knowledge of the test results related to employees of Honda R & D. 655 F.2d at 653.

On page 3, Dorseys state that Honda admitted full responsibility for the design of the AN 600. In fact, in its Answer to the Third Amended Complaint on which the case was tried, Honda denied the allegation that it designed the AN 600 [R-688].

It was Honda which pointed out the distinctions between Honda and Honda R & D which had been made in the evidence during final argument to the jury [T.T. Vol. V, p. 757, 800]. The Dorseys, in rebuttal, told the jury to ignore that distinction [T.T. Vol. V, p. 806-807].

The Dorseys suggest that the decision in *Mercury Motors Express, Inc.* v. *Smith*, 393 So.2d 545 (Fla. 1981) did not represent a new rule of Florida law [Br. in Opp., p. 4, n.2]. If this were true, the Dorseys would have had to point out the evidence of fault on the part of Honda, rather than Honda R & D, in its initial brief in the Court of Appeals, instead of waiting to do it "for the first time" in a response to a petition for rehearing, as they claim [Br. in Opp., pp. 11 & 14]. The Fifth Circuit itself said that the law of Florida allowed punitive damages against a party which "was not itself at fault but was merely vicariously liable for punitive damages. . . ." 655 F.2d at 659. Additionally, the Florida intermediate appellate court in *Mercury Motors* noted the decision in *Alexander* v. *Alterman*, 350 So.2d 1128 (Fla. 1st DCA 1977) as being contrary to the long established rule in Florida. *Mercury Motors Express, Inc.* v. *Smith*, 372 So.2d 116, 117 (Fla. 3d DCA 1979).

The Dorseys insist that some evidence of fault and recklessness on the part of Honda, rather than Honda R & D, was pointed out "for the first time" in their response to Honda's petition for rehearing, and that the Fifth Circuit, after the response, "corrected" its earlier opinion and "ruled that Honda could not use *Mercury Motors* as an 'escape hatch' when the record abounds with evidence of fault . . ." [Br. in Opp., p. 14]. This is an incredible claim in light of the following facts:

1. The Fifth Circuit in its opinion denying rehearing did not state that it found any evidence of fault on the part of Honda;

2. The Fifth Circuit did not alter its reversal of the trial court's holding of no insurance coverage, while

maintaining that whether there was actual fault on the part of Honda was the key to that question [655 F.2d at 659];

3. The matters which the Dorseys now say constitute evidence of fault presented "for the first time"—1971 vehicle tests, a technical paper, and the verdict of negligent failure to warn—had been previously presented by Continental in its brief on the insurance coverage issue [5th Cir. Br. of Continental, pp. 12-17, 20, 24] to support faulty conduct by Honda, as opposed to Honda R & D, and the Fifth Circuit ruled that it was insufficient [655 F.2d at 660].

Several statements by the Fifth Circuit which were not modified or deleted show the lack of evidence of fault on the part of Honda. The Court of Appeals made it clear that the punitive damages award was reinstated because of the conduct of Honda R & D. 655 F.2d at 653-654. In the undeleted portion of the opinion dealing with insurance coverage, the Fifth Circuit said at 655 F.2d at 659:

> The key to this [coverage] question is whether Honda's liability for punitive damages is premised on its own fault or is merely vicarious.

The Court of Appeals also noted that Florida law permits insurance coverage of punitive damages "where the insured party was not itself at fault." 655 F.2d at 659. In deciding that issue the Fifth Circuit reversed the District Court's order that there was no insurance coverage for the punitive damages in this case. 655 F.2d at 660 and 670 F.2d at 22.

The argument that the Court of Appeals applied *Mercury Motors* to this case is inconsistent with the Dorseys' other argument that *Mercury Motors* did not apply because of the pretrial stipulation [Br. in Opp., p. 13]. Rather than applying *Mercury Motors*, the Fifth Circuit ruled that Honda could not rely on *Mercury Motors* because it was "too late for Honda to say post-trial that there was insufficient evidence of its own fault." 670

F.2d at 22. That ruling undercuts any argument that the Court of Appeals applied *Mercury Motors*.

The original opinion of the Fifth Circuit reflects the law of Florida *before Mercury Motors* that punitive damages could be awarded against a party without actual fault and that insurance coverage was available for such awards. 650 F.2d at 659. Thus, it was possible for the Fifth Circuit to reinstate the punitive award, based on Honda's vicarious liability, and reverse the ruling denying coverage, based on the lack of fault on the part of Honda. The decision in *Mercury Motors*, however, made that opinion internally inconsistent since *Mercury Motors* required some actual fault before one could be vicariously liable for punitive damages. The Fifth Circuit dealt with this inconsistency by deleting all of the references to the lack of record evidence on the question of Honda's actual fault, a question which the court itself called "the key" to the coverage issue. In its petition, Honda suggests that the deletion does not fulfill the duty of the Court of Appeals to apply controlling state law and does not conform to the accepted and usual course of judicial proceedings.

C. Burden Of Proof

In connection with Honda's argument that the decision of the Court of Appeals unconstitutionally shifts the burden of proof to the defendant, the Dorseys state that Honda is relying on the deleted language of the opinion as the basis for the argument [Br. in Opp., p. 12]. On the contrary, it is the language of the opinion denying rehearing which raises the problem, for it is there that the Fifth Circuit said that the evidence did not clearly distinguish between the acts of Honda and Honda R & D [670 F.2d at 22] and reimposed punitive damages, in spite of the law of Florida that the plaintiff *must prove* some actual fault on the part of the principal in order to recover punitive damages against the principal.

D. The Stipulation

In their brief, the Dorseys repeat the argument of the Fifth Circuit that Honda could not rely on *Mercury Motors* because it had stipulated that "in legal effect the acts of Honda R & D and its employees were its own acts." 670 F.2d at 22 [Br. in Opp., p. 13]. As noted in the petition for certiorari, that was not the stipulation. The stipulation, reproduced in the Fifth Circuit's opinion, 655 F.2d at 653, was that Honda, the manufacturer, was liable *by law* in negligence or breach of warranty for any defective designs of third parties. Honda did not stipulate that "the acts of Honda R & D and its employees were its own acts."

E. Compliance With Standards

Contrary to the Dorseys' suggestion that Honda's compliance argument was not raised until appeal, Honda argued at trial that compliance was evidence of reasonable care and compliance with all applicable regulations was one of the reasons the District Court granted judgment n.o.v. in favor of Honda on the claim for punitive damages. Neither of the lower courts considered that Honda had waived this issue, and both specifically ruled on it.

The extent of misrepresentation of the record done by the Dorseys in this case is best illustrated by their effort to suggest that Honda never argued compliance with the regulations as proof of reasonable care in the district court. They state:

> At trial, Honda did not articulate any such ground in its motion for directed verdict, requested no jury instruction on the point and conceded at the charge conference that compliance did not mean that it did not do anything wrong. [Br. in Opp., p.3].

While this language appears in the Fifth Circuit's opinion, 655 F.2d at 656, it has its genesis in the Dorsey Reply

Brief, pages 17-18, where the Fifth Circuit was told that Honda's counsel said:

> We never put a single man on the Witness Stand and said just because we [meet the regulations] we are not guilty.. . .
>
> . . .[A]nd I'm not going to argue that [compliance] proved we didn't do anything wrong.. . .
> (T.T. Vol. V, p. 721).

What was actually said was:

> [Honda Counsel] Judge, the only testimony in this case has been by the Plaintiff's own expert that those, that compliance with those standards resulted in a reasonably safe vehicle.
>
> * * * *
>
> We never put a single man on the Witness Stand and said just because we meant [sic-"met"] this we are not guilty.
>
> [The Court] Yes.
>
> [Honda Counsel] It is their evidence, their witness who testified to that fact.
>
> [The Court] Yes.
>
> [Honda Counsel] I think under the circumstances of this case, and I'm not going to argue that this proved we didn't do anything wrong, I'm going to argue that it proves according to their own expert they met the standard of care.
> (T.T. Vol. V, p. 721).

The jury was instructed under Florida law on the effect of the standards received in evidence [T.T. Vol. V, pp. 824-825], and Honda did argue that its compliance with the federal standards was reasonable care [T.T. Vol. V, pp. 766-770, 799-800].

In their Statement of the Case, Dorseys argue that the evidence showed that Honda developed an internal stand-

ard in anticipation of a federal regulation which was to go into effect six months after the Dorsey vehicle was manufactured and that Honda knew Dorsey's AN 600 did not comply with that standard [Br. in Opp., p.3].

In the record there is no evidence that the 1971 AN 600 failed to meet any company standard in effect at the time it was manufactured. The federal regulation which became effective six months after manufacture of the Dorsey vehicle was MVSS 208. That regulation was proposed in 1970; promulgated in early 1971, effective in 1972, and did not apply to Dorsey's vehicle. Development of the AN 600 began in the mid-1960's [655 F.2d at 652], years before MVSS 208 was proposed. Production of the American model began in 1969 [T.T. Vol. I, p. 172].

The Dorseys repeat their often repeated, but unsupported, allegation that the AN 600 failed to comply with MVSS 208, "a comprehensive standard which did deal with the claimed defect in this case." [Br. in Opp., p. 16]. Tests for compliance with MVSS 208 were received in evidence as Plaintiffs' Exhibits 26, 27 and 32 and Defendants' Exhibit 8.

Plaintiffs' Exhibit 26 was an MVSS 208 test done in December, 1971. The exhibit says that the car being tested was an AZ 600 C, "Year: 1972." The report stated:

> V. Conclusion
> The articles tested according to the Federal requirments [sic] meet the applicable standard.

Plaintiffs' Exhibit 27 was an MVSS 208 test done in December, 1971, on an AN 600 C, "Year: 1972." The report stated:

> V. Conclusion
> The articles tested according to the Federal requirments [sic] meet the applicable standard.

Plaintiffs' Exhibit 32 was an MVSS 208 test done on a 600 model [T.T. Vol. I, p.216] in October, 1971. The test

was done at 32.25 m.p.h., faster than the standard required, but the report said the car still complied with the standard, although there was some question of whether the forces on the head were within the standard.

Defendants' Exhibit 8 was an independent MVSS 208 test done under contract for the Department of Transportation on a 1972 Honda 600. That report states on page 15:

> The above test results indicate that the subject 1972 Honda 600 is in compliance with Federal Motor Vehicle Safety Standard 208.

Rather than "direct evidence of the failure of the AN 600 to meet the requirements of MVSS 208" [Br. in Opp., p.16], these exhibits were direct evidence that the AN 600, 1972 model, *complied* with MVSS 208. There were no test reports showing that the 1971 model did or did not comply with MVSS 208. Consequently, the most that could be said favorably to the Dorseys is that there was no evidence that the 1971 AN 600 complied with MVSS 208.

In opposing certiorari to review the question of the effect of compliance with the federal standards, the Dorseys completely ignore the federal preemption provisions of the statute. In final argument, the Dorseys told the jury:

> You are the community and you set the community standards by which we are all going to live. You can say what is proper, you can say what is acceptable, you can mark conduct with your approval as meeting the community standard, or you can reject conduct and say we want a better standard, a safer standard in our community.
> [Trans. Pl. Arg., p. 3].

Federal law, however, prohibits communities enacting "better" standards for motor vehicle safety. 15 U.S.C. § 1392(d).

Uniform standards are meaningless unless there is also a uniform measure of liability. A fuel tank placement

standard, for example, is meaningless if separate juries may find a manufacturer liable for placing a fuel tank behind, over, or in front of the rear axle. How can a manufacturer comply with such "standards"?

Federal law provides that suit may be brought even though the manufacturer complies with the federal standards, but it is silent as to the law that should govern that suit. A rebuttable presumption that compliance with all applicable federal regulations results in at least a minimally safe vehicle serves both purposes of the statute to provide uniform safety standards and access to the courts for injured people. Manufacturers would have some certainty about the standards to be applied in determining their liability, but would not be immune from suit.

The need for clarification of the relationship between 15 U.S.C. § 1392(d) and § 1397(c) is especially great in the area of punitive damages. In one sense, the Dorseys statement that "Honda is really contending . . . that absent violation of a safety standard, a manufacturer cannot be liable for punitive damages" [Br. in Opp., p.15] is correct, for if a manufacturer has taken care to comply with all applicable safety standards, how can a jury legitimately find a *complete* lack of care and reckless indifference to safety? In this case, the District Court ruled that they could not and entered judgment for Honda on the punitive damage claim. Thus, Honda is contending that, when there are safety standards, compliance with the standards defeats a claim for punitive damages. Certainly, when there are no standards at all, proof of violation of a standard is not only unnecessary, but impossible, and Honda is not advancing that proposition. Prohibiting punitive damages when there is compliance with all applicable standards does not restrict state common law standards permitting punitive damages in cases where there is no care, but gives proper legal effect to the

fact of compliance as evidence of some care, thus fulfilling the requirements of state law.

This is a federal statute which attempts to preempt all state safety regulations. Only this Court can announce standards to govern liability which would be uniform and fulfill the purposes of this statute. The question affects not just every manufacturer, but every individual in the United States who rides in a motor vehicle. Certiorari should be granted, so that these problems may be addressed.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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MOTION FILED
JUN 21 1982

No. 81-2252

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

HONDA MOTOR COMPANY, LTD.
and AMERICAN HONDA MOTOR
CO., INC.,

Petitioners,

v.

GLEN K. DORSEY, BARBARA DORSEY,
CONTINENTAL CASUALTY CO., and
MISSION INSURANCE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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No. 81-2252

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

HONDA MOTOR COMPANY, LTD. and AMERICAN HONDA MOTOR CO., INC.,	:
Petitioners,	:
v.	:
GLEN K. DORSEY, BARBARA DORSEY, CONTINENTAL CASUALTY CO., and MISSION INSURANCE COMPANY,	:
Respondents.	:
	:

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Product Liability Advisory Council of the Motor Vehicle Manufacturers Association of the United States, Inc. (hereinafter MVMA), hereby respectfully moves, under Supreme Court Rule 36, for

leave to file the attached brief amicus curiae in this case. The consent of the attorneys for the Petitioners has been obtained. The consent of the attorneys for the Respondents was requested but refused.

Amicus curiae support the petition for certiorari. The aspect of the case of the greatest single concern to it is the ruling by the U.S. Court of Appeals for the Fifth Circuit that the trial judge erred in granting Judgment N.O.V. against the award of punitive damages even though the manufacturer had complied with all relevant federal safety standards.

(a) Statement of Interest of Amicus Curiae

The interest of amicus in this controversy arises from the role of its members as producers of automobiles and defendants in product litigation.

The MVMA is a trade organization, primarily composed of automobile manufacturers. The Product Liability Council is a committee of the MVMA, concerned with questions of tort law reform.

Members of the MVMA build over 99% of all motor vehicles produced in the United States. In addition, MVMA members manufacture such diverse products as farm, industrial, lawn and garden tractors; other agricultural equipment; construction and mining machinery; locomotives and other railroad rolling stock; as well as

winches and gasoline and diesel engines for innumerable industrial and agricultural uses. These products are used and sold throughout the United States. Their manufacturers are subject to extensive federal safety regulations and, also, to tort claims in every jurisdiction, state and federal. Any one of those cases may involve a claim for punitive damages. Moreover, motor vehicle manufacturers historically are a leading target for product liability claims and, therefore, have a particularly vital interest in the resolution of this matter.

This brief offers the Court a somewhat more detailed discussion of the statutory language, legislative history and public policy issues which are involved in the Petitioner's third Question Presented:

May punitive damages be awarded against an automobile manufacturer which has complied with all applicable federal regulations, when those regulations preempt state law and where state law requires proof of wanton disregard of the rights of others for imposition of punitive damages?

It is our hope that a discussion from the viewpoint of the broad class of defendants effected, rather than an individual defendant, will be a useful supplement.

Respectfully submitted,

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A member of the Bar of the Supreme Court of the United States

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CERTIFICATE OF SERVICE

Undersigned counsel for Amicus Curiae Motor Vehicle Manufacturers Association certifies that service of this Motion for Leave to File Brief Amicus Curiae has been made upon counsel for respondents and counsel for petitioners this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following:

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No. 81-2252

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

HONDA MOTOR COMPANY, LTD. and AMERICAN HONDA MOTOR CO., INC.,	:
Petitioners,	:
v.	:
GLEN K. DORSEY, BARBARA DORSEY, CONTINENTAL CASUALTY CO., and MISSION INSURANCE COMPANY,	:
Respondents.	:

ENTRY OF APPEARANCE

PLEASE TAKE NOTE that Aubrey V. Kendall, P.A., a member of the Bar of the Supreme Court of the United States, of the firm of MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE,

hereby enters his appearance in this cause as attorney for Amicus Curiae Motor Vehicle Manufacturers Association of the United States, Inc.

DATES THIS 18th day of June, 1982.

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No. 81-2252

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

HONDA MOTOR COMPANY, LTD.
and AMERICAN HONDA MOTOR
CO., INC.,

Petitioners,

v.

GLEN K. DORSEY, BARBARA DORSEY,
CONTINENTAL CASUALTY CO., and
MISSION INSURANCE COMPANY,

Respondents.

BRIEF OF AMICUS CURIAE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC.

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(a) Neither section 1397(c) nor anything else in the text of the statute, or its legislative history, says a federal district court must allow a punitive award under these circumstances.	4

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus contends that the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§1381, et seq. (henceforth referred to as the Safety Act) means, properly interpreted, that jurors may not impose punitive damages against manufacturers who comply with all applicable federal standards -- even if state law otherwise would permit such awards.

It follows that the Fifth Circuit is in error when it argues (655 F.2d 650 (1981) that general principles of state tort law provide a sufficient basis for punitive damages in this case. Even if the Court's analysis of state law (debatable in itself) were correct, the federal statute would require a different result.

Congress did not say that punitive damages were permissible. True, the draftsmen did not explicitly forbid such awards either. But the full text, particularly the provision for federal preemption, the historical context of the statute and the emphasis in the legislative debates on the need for uniformity in standards for a national industry, call for that conclusion.

The Fifth Circuit erred because it placed excessive weight on §1397(c) which provides that compliance with a federal motor vehicle safety standard does not "exempt any person from any liability under common law". While pertinent, that section should not be interpreted in isolation from Section 1392(d) which prohibits a state from setting a motor vehicle safety standard not identical to the federal standard. To permit jurors to

decide that compliance with specific standards established by a federal agency is not enough even to negate a charge of "wanton disregard for safety" nullifies the latter provision.

Ultimately, the Court may decide that a rule against punitive damages in such circumstances would be appropriate. Instead, it might adopt a rebuttable presumption that one who complies with applicable federal standards is not guilty of "callous disregard of safety". At this juncture, the MVMA suggests only that the case provides an opportunity for a definitive ruling on this important question of federal law.

I. THE MEANING OF THE STATUTE IS A QUESTION OF FEDERAL LAW WHICH REQUIRES CONSIDERATION OF THE ENTIRE TEXT, THE CONGRESSIONAL DEBATES AND THE GENERAL HISTORICAL BACKGROUND OF THE LEGISLATION

(a) Neither section 1397(c) nor anything else in the text of the statute, or its legislative history, says a federal district court must allow a punitive award under these circumstances.

The Fifth Circuit suggested that the general reference to "liability" in 15 U.S.C. §1397(c) means a federal district court judge, considering a motion for Judgment N.O.V. against an award of punitive damages, may not take into account the manufacturer's compliance with federal safety standards. Yet, in ordinary speech and legal terminology alike, "liability" -- the key word -- is not the same thing as "damages". Thus to say compliance does not bar "liability" is

not to say compliance may not be a critical factor in the decision as to what damages are permissible.[1/]

This, we admit, is a purely verbal analysis; but it gains substance from the historical context of the Safety Act. Congress passed the statute in 1966. At that time compensatory damages were the only awards sought in product liability cases for all practical purposes.[2/] The

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1/ "Liability" refers to the cause of action and its elements while "damages" are the measure of recovery. See Black's Law Dictionary (1968), in particular the statement at page 1059 that "liability" is not "synonymous with 'loss' or 'damage'". For cases which recognize that distinction in a variety of contexts, see Ghiardi and Kircher, Punitive Damage Recovery in Products Liability Cases, 65 Marq. L. Rev. 1 (1981), pp. 47-53.

2/ For general historical background, see Owen, Punitive Damages in Product Litigation, 74 Mich. L. Rev. 1257, 1262-63, 1269 (1976). Arguably, over

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first significant judicial comment on a punitive damage claim against a manufacturer appeared in Roginsky v. Richardson-Merrill, Inc., 378 F.2d 832 (2d Cir. 1967). Judge Friendly did not write that opinion until 1967. Indeed as late as 1970, four years after the passage of the Safety Act, an Annotation complained of the "paucity" of cases discussing punitive damages in product liability matters, 29 A.L.R.3d 1021 (1970).3/

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the course of legal history, there were awards in cases involving historical forerunners of product liability. But these were too rare to constitute a significant part of product liability law, Ghiardi and Kircher, supra, at 12. Thus it is improbable that Congress had them in mind.

3/ Even today, in fact, the question is highly controversial. Ghiardi and Kircher, ibid. in passim.

The legislative history makes it still more unlikely that Congress intended, in 1966, to authorize punitive damages by the general reference to "liability."

Nothing was said of punitive damages. Even the references to private litigation in general were scanty and incidental. Senate Report 1301, for instance, commented that:

> "The federal minimum safety standards need not be interpreted as restricting state common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law."
>
> 1966 U.S. Code Cong. & Admin. News, p. 2720 (emphasis added).

Similarly, during the floor debate, Senator Magnuson mentioned that the Senate

conferees had accepted House language which created Section 1397(c), but he emphasized the limited significance of the provision:

> "... The provision does not prevent any person from introducing in a lawsuit evidence of compliance or non-compliance with federal standards. No court rules of evidence are intended to be altered by this provision."
>
> 1966 Cong. Rec. 20599.

With equal brevity, Senator Cotton commented:

> "... proof of compliance with federal standards may be offered in any proceeding for such relevance and weight as courts may give it."
>
> 1966 Cong. Rec. 20602.

The statutory text and the legislative history,[4/] then, make it clear that the

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4/ The House debates added little except a remark by Congressman Dingell:

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Safety Act did not outlaw private product liability claims in their entirety. On the other hand, there is no evidence of any intention to deal with specific aspects of those claims as they existed in 1966.

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> ". . . We have preserved every single common law remedy that exists against the manufacturer for the benefit of a motor vehicle purchaser. This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain in the buyer, and they can be exercised against the manufacturer.
>
> 1966 Cong. Rec. 19663.

Note that this was part of a speech opposing criminal penalties. The Congressman said nothing of punitive damages as an "existing" remedy, even though that would have supported his argument that there was no need for criminal penalties.

Nor did Congress say federal regulations could not be given the weight which might seem logical if the body of state law were to change significantly - as it did when claims for punitive damages later came into fashion. Instead, the draftsmen left questions such as the significance of compliance with standards to future resolution by the judiciary in the light of the text and the policies emphasized in the debates.[5/]

5/ This, we point out, is significantly different from leaving the question of the weight of compliance to the jury, as the Fifth Circuit did in this case.

(b) The key statutory language prohibits states from enforcing safety standards different from those set by the federal agency.

If the Circuit Court gave too much weight to Section 1397(c), it gave too little to Section 1392(d) which provides that no state may set a safety standard not identical to the NHTSA standard governing the same aspect of performance. In addition, the Court said nothing of Section 1392(a) which requires that every federal motor vehicle standard be "practicable" and that it be "stated in objective terms". Yet these provisions reflect the emphasis in the legislative history on the necessity for uniformity and predictability. (See 1966 Cong. Rec. 13585).

Although the point has not been discussed often, there is authority that state courts and juries applying state law may not override federal law with impunity, any more than can the state executive or legislature, San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) (dicta). Also see, Hoenig, Resolution of "Crashworthiness" Design Claims, 55 St. John's L. Rev. 633 (1981) pp. 707-716; the author concludes that to permit the imposition of punitive damages as a matter of state law would nullify federal preemption and, often, subject manufacturers to conflicting and inconsistent requirements.6/

6/ Compare Gray v. General Motors Corp., 434 F.2d 110 (8th Cir. 1970) in which the plaintiff attacked the manufacturer for not putting a "pop-out" window in the vehicle, with FMVSS 212 which requires that the

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The basic purpose and nature of punitive damages give added force to Hoenig's suggestion. Awards of that nature, by definition, do not "compensate". Instead they are usually rationalized as compelling better engineering practice, Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981). If that is their function, however, they are an indirect way to set a standard under state tort law which is different from the federal standard - and therefore, not permissible under Section 1392(d).7/

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windshield stay in place in a severe crash. For other instances of inconsistent theories, see Hoenig, supra, at 710-712.

7/ On the other hand, the punitive award may permit jurors to vent moral outrage. Owen, Problems in Assessing

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II. THE SIGNIFICANCE OF COMPLIANCE REMAINS THE HEART OF THE CASE

The Circuit Court is mistaken when it suggests that compliance with federal standards is not the central issue.

The Court discusses alternative designs advocated by the plaintiff's expert at some length. But those suggestions for different techniques are not, in themselves, proof that the Honda

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Punitive Damages Against Manufacturers of Defective Products, 49 Chi. L. Rev. 1 (1982) at 47. In this it is analogous to a criminal sentence. Certainly the general public must often understand this to be the purpose of highly publicized examples such as the $125,000,000 award in Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757, 174 Cal. Rptr. 348 (1981). Yet each house of Congress, by a large margin, rejected the suggestion that the Safety Act include criminal penalties. 1966 Conc. Rec. 13607; 18808.

designers were guilty of "willful disregard for safety" because they chose a different approach. More important, the Circuit Court opinion does not succeed when it attempts to deal with the Congressional concern that the Safety Act not be interpreted in a way which would outlaw economical, small cars. 1966 Cong. Rec. 18780.

The Court suggests that Honda's designers could have used "metal bones" or heavier metal, or a lengthier hood (655 F.2d at 655). That might have produced a vehicle literally of the same "size" as the actual car. But any such change could have effected the weight, cost and even the basic character of the vehicle.[8/]

8/ Moreover, one scholar has pointed out that the creation of such a "pocket battleship" would not necessarily increase safety. The unusual

Footnote Continued

The Court also suggests (655 F.2d at 650) that a complying manufacturer can be liable because of aspects of the design for which the agency has not issued standards. This, too, fails to take into account the depth and complexity of the practical problems faced by designers and regulators alike. The mere absence of a specific standard does not mean, necessarily, that the National Highway Traffic Safety Administration did not consider the matter. The agency could have decided that other technical standards make an additional regulation superfluous. Or practical constraints,

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rigidity might make it a danger to others in a collision. Hoenig, supra, at 713. Also see, Dawson v. Chrysler, supra.

such as economics, might require the manufacturer to devote limited resources to some other part of the design, so that the proposed requirement could only detract from overall safety. Hoenig, supra, at 712 n. 349.

Further, while the Court's suggestion might be an adequate rationalization for a compensatory award, arguendo, the severe character of punitive damages requires a more substantial basis. If the agency, a third party charged with responsibility for public safety, did not think a particular aspect of the vehicle called for a standard, it is far from self-evident why the manufacturer was guilty of morally outrageous conduct for reaching essentially the same conclusion. These are matters of judgment and priority. Even if the agency was "wrong",

in some sense, that does not mean it was reckless or malevolent -- and the same is true of the manufacturers.[9/]

Thus the significance of compliance and, also, the more general principle of Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974) are very much at issue in this case.

9/ Similarly, the fact that there was testimony that a Honda engineer urged the Company to use a different design shows, in itself, no more than a difference of opinion among engineers. Professor Owen, in fact, has pointed to that testimony in this very case to illustrate the danger that juries, carried away with emotion, will impose punitive damage simply because some alternative design approach was possible or was considered and rejected. Owen, Chi. L. Rev., supra, at 17 n.83.

III. SCHOLARS HAVE SUGGESTED A VARIETY OF WAYS TO BALANCE THE NEED FOR UNIFORMITY WITH DEFERENCE FOR STATE LAW

Professor Owen urges that compliance with a regulation or statute "ordinarily should be deemed to be conclusive proof of good faith and hence a conclusive defense to a punitive damage claim". (49 Chi. L. Rev., supra, at 142). Others place greater emphasis on the possibility that an individual standard may be deficient, as was the flammability standard discussed Gryc v. Dayton-Hudson Corp., 927 (Mich. 1979), cert. denied, 449 U.S. 921 (1980). They would let compliance create a presumption of care, to be overcome only by clear cut evidence to the contrary. Epstein, MODERN PRODUCT LIABILITY LAW, 1980, p. 180.

Along the same lines, the need for uniformity and fairness might be reconciled with considerations of federalism by a ruling that compliance is not a defense to a compensatory claim but that it does negate a demand for punitive damages. See Linn v. United Plant Guards Workers, 383 U.S. 53 (1966)(dicta); Hoenig, supra, at 710.

CONCLUSION

For the reasons set forth, amicus urges that certiorari be granted.

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Dated: June 18, 1982

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No. 81-2252

In the Supreme Court of the United States

October Term, 1982

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AMERICAN HONDA MOTOR CO., INC.,
Petitioners,

vs.

GLEN K. DORSEY, BARBARA DORSEY,
CONTINENTAL CASUALTY CO. and
MISSION INSURANCE COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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The Respondents, GLEN K. DORSEY and BARBARA DORSEY, Plaintiffs in the trial court, oppose the Motion for Leave to File Brief Amicus Curiae filed by the Products Liability Advisory Council of the Motor Vehicle Manufacturers Association of the United States, Inc. (hereinafter "MVMA") on the following grounds:

1. The MVMA's brief does nothing more than reargue the matters contained in Point 4 of the Petitioner's Petition for Writ of Certiorari. The brief is, as the MVMA

candidly admits, merely a "verbal analysis"[1] of the issues involved and, as such, provides this Honorable Court with no guidance or insight, but serves merely to confuse the simple issue before the Court on the Petition.

2. This is a case which was decided on its unique set of facts. The automobile involved was only imported into this country for two years. Far from affecting a "broad class of defendants" as stated by the MVMA, this case has only very limited application to products liability litigation for the simple reason that it is extremely rare that a major product manufacturer is guilty of the type of wanton conduct found here—to wit, intentionally manufacturing and marketing a vehicle with a defect which the manufacturer *knew* could cause severe personal injury and death to purchasers and other occupants. Far from applying to a broad spectrum of motor vehicle producers, Respondents respectfully submit that the decision below applies only to the very small number of manufacturers which engage in the type of conduct found in the present case. As such, the interest of the overall MVMA in this case is minimal.

3. The primary reason offered in support of MVMA's motion is its interest in whether punitive damages may be awarded where the manufacturer has complied with all applicable federal regulations. This is a false issue. What the MVMA fails to mention is that the present case was based upon the faulty design of the passenger compartment. The Fifth Circuit gave the most intelligent and succinct response to this issue by aptly noting that ". . . none of the regulations applicable to Dorsey's car governed the strength of the A pillar or the overall ability of the passenger compartment to protect occupants in a

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1. See MVMA's brief at 5.

crash . . ." 655 F.2d at 657. Thus, compliance with federal standards is meaningless in this case because the applicable standards did not go into effect until shortly after the Dorsey vehicle was manufactured. 655 F.2d at 657, n. 6. Accordingly, this issue should not provide the grounds upon which the MVMA is permitted to file an amicus curiae brief in this cause.

4. The issue of compliance with federal regulations is in no way determinative of the issues before this Honorable Court. Indeed, 15 U.S.C. § 1397(c) provides that compliance with the federal regulations "does not exempt any person from any liability under common law." 655 F.2d at 656. This case deals purely with a question of state law and willful and wanton conduct on the part of a foreign importer and manufacturer. The interest of the MVMA, therefore, for reasons set forth above, is minimal and its motion should be denied.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 2nd day of July, 1982 to: William H. Crabtree and Edward P. Good, Motor Vehicle Manufacturers Association of the U.S., 300 New Center Building, Detroit, Michigan 48202; Aubrey V. Kendall, P.A., Edward T. O'Donnell, Mershon, Sawyer, Johnston, Dunwody & Cole, Suite 1600, Southeast Bank Building, Miami, Florida 33131; Carey A. Randall, Esquire, Walton, Lantaff, Schroeder & Carson, 900 Alfred I. duPont Building, 169 East Flagler Street, Miami, Florida 33131; Joel R. Teague, Esquire, 2801 Ponce de Leon Boulevard, Coral Gables, Florida 33134; Anthony M. Lanzone, Esquire and Robert A. Calinoff, Esquire, 26 Broadway, New York, New York 10004; Thomas B. DeWolf, Esquire, DeWolf, Ward, Morris Wohlust, Jontz & O'Donnell, 1475 Hartford Building, 200 East Robinson Street, Orlando, Florida 32801; John Edwin Fisher, Esquire, Akerman, Senterfitt & Eidson, Post Office Box 231, Orlando, Florida 32802; and Marion R. Shepard, Esquire, Mathews, Osborne, Ehrlish, McNatt, Gobelman & Cobb, 1500 American Heritage Building, Jacksonville, Florida 32202.

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